Supreme Court, U.S.
FILED

No. 94 1806 MAY 2 - 1995

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

SHRICHAND CHAWLA, LEO D. CURRAN, WILLY HERMANS, RED CIRCLE INVESTMENT, LTD., JALEH KHORASSANCHY, AMIT PANDYA, SOHA, INC., IDRISS DEVCO, INC., and S&L GENTRADE, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent

Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

KEVIN P. RODDY
Counsel of Record
MILBERG WEISS BERSHAD HYNES & LERACH
355 South Grand Avenue, Suite 4170
Los Angeles, CA 90071
Telephone: 213/617-9007

PROFESSOR G. ROBERT BLAKEY
NOTRE DAME SCHOOL OF LAW
Notre Dame, IN 46556
Telephone: 219/631-5717

WILLIAM S. LERACH
DENNIS STEWART
WILLIAM DATO
MILBERG WEISS BERSHAD HYNES & LERACH
600 West Broadway, Suite 600
San Diego, CA 92101
Telephone: 619/231-1058

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Are defrauded bank depositors who assert a constructive trust or a related theory over forfeited assets of the Bank of Credit and Commerce International ("BCCI"), an illegal enterprise, entitled to an amended forfeiture order under Section 1963(l)(6)(A) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1963(l)(6)(A), where Petitioners assert that they have a "legal right, title, or interest in the [forfeited] property . . . [that is] superior to any right, title, or interest of the defendant [BCCI] at the time of the commission of the [RICO predicate] acts which gave rise to the forfeiture"? (Yes)

PARTIES TO THE PROCEEDING

Petitioners are Shrichand Chawla, Leo D. Curran, Willy Hermans, Red Circle Investment, Ltd., Jaleh Khorassanchy, Amit Pandya, Soha, Inc., Idriss Devco, Inc. and S&L Gentrade, Inc., who were the Claimants-Appellants in the District of Columbia Circuit. Respondent is the United States of America, which was the Plaintiff-Appellee in the court below.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

BASIS FOR JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

A. BCCI's Seizure, Guilty Plea And Liquidation 4

B. BCCI Forfeiture Proceedings 5

C. The Hamid Class Action 6

D. Proceedings In The Courts Below 8

1. Petitioners' Section 1963(l) Petitions 8

2. The District Court's Decision 10

3. The Court Of Appeals' Decision 10

REASONS FOR GRANTING THE WRIT 13

I. THIS CASE PRESENTS IMPORTANT QUESTIONS OF LAW CONCERNING INNOCENT THIRD PARTIES' RIGHTS IN RICO FORFEITURE CASES AND REVIEW BY THIS COURT IS NECESSARY TO RESOLVE A SPLIT IN THE CIRCUITS AS TO THE PROPER CONSTRUCTION AND APPLICATION OF SECTION 1963(l)(6)(A) OF RICO 15

A. The Purpose And Construction Of Section 1963(l) Of RICO 15

B. The Constructive Trust Asserted By Petitioners In BCCI's Forfeited Funds Is A Legal Interest That Is Superior To The Criminal Defendant's Right, Title, Or Interest Therein And, Therefore, It Is Superior To The Government's Derivative Interest 21

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Alexander v. United States, ___ U.S. ___, 113 S. Ct. 2766 (1993) 16

Austin v. United States, ___ U.S. ___, 113 S. Ct. 2801 (1993) 14, 18

Beatty v. Guggenheim Exploration Co., 225 N.Y. 380, 122 N.E. 378 (1919) 23

Capital Investors Co. v. Executors of Estate of Morrison, 800 F.2d 424 (4th Cir. 1986) 27

Caplin & Drysdale v. United States, 491 U.S. 617 (1989) 16

Ceribelli v. Elghanayan, 990 F.2d 62 (2d Cir. 1993) 8

Chauffeurs Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558 (1990) 17

China Fire Ins. Co. v. Davis, 50 F.2d 389 (2d Cir.), *cert. denied*, 284 U.S. 658 (1931) 24

Chiu v. Wong, 16 F.3d 306 (8th Cir. 1994) 27

County of Oakland v. Vista Disposal, 826 F. Supp. 218 (E.D. Mich. 1993) 11, 19, 20, 22

Department of Revenue v. Kurth Ranch, ___ U.S. ___, 114 S. Ct. 1937 (1994) 14

GICC Capital Corp. v. Technology Fin. Group, 30 F.3d 289 (2d Cir. 1994) 8

Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 112 S. Ct. 1311 (1992) 8

Humble Oil & Refining Co. v. Sun Oil Co., 191 F.2d 705 (5th Cir. 1951), *cert. denied*, 342 U.S. 920 (1952) 17

TABLE OF AUTHORITIES – Continued

Page

Hussey v. Palmer, 4 All E.R. 744, 1 W.L.R. 1286 (1972) 23

In re Bank of Credit and Commerce Int'l Depositors Litig., MDL Docket No. 908, 15 RICO L. Rptr. 1234 (C.D. Cal. May 20, 1992), *aff'd*, No. 92-56085, 1995 U.S. App. LEXIS 7693 (9th Cir. Apr. 7, 1995) 1, 7

In re Metmor Fin., Inc., 819 F.2d 446 (4th Cir. 1987) 28

In re EDC, 930 F.2d 1275 (7th Cir. 1991) 8

In re General Coffee Corp., 64 B.R. 702 (S.D. Fla. 1986), *aff'd*, 828 F.2d 699 (11th Cir. 1987), *cert. denied*, 485 U.S. 1007 (1988) 27

In re Lela & Co., 551 F.2d 399 (D.C. Cir. 1977) 23

In re Ryan, 15 B.R. 514 (Bankr. D. Md. 1981) 13

McCormick v. Grogan, 4 L.R.-E. & I. App. 82 (1869) 23

Mitsubishi Int'l Corp. v. Cardinal Textile Sales, 14 F.3d 1507 (11th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1092 (1995) 27

Moore v. Crawford, 130 U.S. 122 (1889) 23

New York Trust Co. v. Eisner, 256 U.S. 345 (1921) 15

New York v. United States, ___ U.S. ___, 112 S. Ct. 2408 (1992) 18

Ocean Energy II, Inc. v. Alexander & Alexander, 868 F.2d 740 (5th Cir. 1989) 8, 9

Old Security Life Ins. Co. v. Continental Ill. Nat'l Bank & Trust Co., 740 F.2d 1384 (7th Cir. 1984) 24

Osin v. Johnson, 243 F.2d 653 (D.C. Cir. 1957) 24

Peisch v. Ware, 8 U.S. (4 Cranch.) 347 (1808) 18

Provencher v. Berman, 699 F.2d 568 (1st Cir. 1983) 9

TABLE OF AUTHORITIES – Continued

Page

Republic Nat'l Bank v. United States, ___ U.S. ___, 113 S. Ct. 554 (1992) 14

Rolfe v. Gregory, 4 Deg. J. & S. 576 (1864) 23

Russello v. United States, 464 U.S. 16 (1983) 16

SEC v. Levine, 689 F. Supp. 317 (S.D.N.Y. 1988), *aff'd in part and rev'd in part on other grounds*, 881 F.2d 1165 (2d Cir. 1989) 22, 27

SEC v. Paige, 1985 Westlaw 2335, 1985 U.S. Tax Cas. (CCH) ¶9588 (D.D.C. July 30, 1985), *aff'd*, 810 F.2d 307 (D.C. Cir. 1987) 22

St. Louis & S.F.R. v. Johnston, 133 U.S. 566 (1890) 24

Torres v. $36,256.80 U.S. Currency, 25 F.3d 1154 (2d Cir. 1994) 11

United States v. $38,000.00 in United States Currency, 816 F.2d 1538 (11th Cir. 1987) 10

United States v. 92 Buena Vista Ave., ___ U.S. ___, 113 S. Ct. 1126 (1993) 14, 20, 27

United States v. All Assets of Statewide Auto Parts, Inc., 971 F.2d 896 (2d Cir. 1992) 15

United States v. Campos, 859 F.2d 1233 (6th Cir. 1988) 11, 21, 22

United States v. Cauble, 706 F.2d 1322 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984) 17

United States v. Delco Wire & Cable Co., 772 F. Supp. 1511 (E.D. Pa. 1991) 17

United States v. Fontana, 528 F. Supp. 137 (S.D.N.Y. 1981) 22, 27

United States v. Holzer, 840 F.2d 1343 (7th Cir.), *cert. denied*, 486 U.S. 1035 (1988) 27

United States v. James Daniel Good Real Property, ___ U.S. ___, 114 S. Ct. 492 (1993) 14

TABLE OF AUTHORITIES – Continued

Page

United States v. Kramer, 912 F.2d 1257 (11th Cir. 1990) 17, 19

United States v. L'Hoste, 609 F.2d 796 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980) 16, 17

United States v. Lavin, 942 F.2d 177 (3d Cir. 1991) 11, 20, 21

United States v. Libretti, 38 F.3d 523 (10th Cir. 1994), *cert. granted*, No. 94-7427, 1995 U.S. LEXIS 2258 (Mar. 27, 1995) 14

United States v. Marx, 844 F.2d 1303 (7th Cir. 1988) 11, 22

United States v. Monsanto, 491 U.S. 600 (1989) 16

United States v. One 1976 Mercedes Benz, 618 F.2d 453 (7th Cir. 1980) 18

United States v. One Parcel of Real Estate Property, 660 F. Supp. 483 (S.D. Miss.), *aff'd on other grounds*, 831 F.2d 566 (5th Cir. 1987) 28

United States v. Pelullo, 14 F.3d 881 (3d Cir. 1994) 17, 18

United States v. Reckmeyer, 836 F.2d 200 (4th Cir. 1987) 11, 16, 19

United States v. Schwimmer, 968 F.2d 1570 (2d Cir. 1992) 11, 19, 21, 22

United States v. Stowell, 133 U.S. 1 (1890) 28

United States v. $191,910.00 in U.S. Currency, 16 F.3d 1051 (9th Cir. 1994) 15

Walker v. The Ware, Hadhan & Buntinsford Ry Co., 1 Equity Cas. 195 (1865) 9

Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100 (1969) 17

TABLE OF AUTHORITIES – Continued

Page

STATUTES, RULES AND REGULATIONS

11 U.S.C. §726(a)(3) 13
11 U.S.C. §726(a)(4) 13
18 U.S.C. §512 15
18 U.S.C. §981 15
18 U.S.C. §1466 15
18 U.S.C. §1955(d) 15
18 U.S.C. §§1961, *et seq.* ..... *passim*
18 U.S.C. §1963 ..... *passim*
18 U.S.C. §2254 15
21 U.S.C. §467b(a) 15
21 U.S.C. §848 17
21 U.S.C. §853 ..... 11, 17, 22
28 U.S.C. §1254(1) 2

SECONDARY AUTHORITIES

V Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* §463 (4th ed. 1989) 23, 24, 26

Comment, *RICO Forfeiture: Secured Lenders Beware*, 37 UCLA L. Rev. 1199 (1990) 15, 28

1 David B. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 1.02 (1985 & Supp. 1994) 14

Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations for 1995, Hearings Before the House Subcomm. on Appropriations, 103rd Cong., 2d Sess. 781 (1994) 16

I George E. Palmer, *The Law of Restitution* §1.3 (1989) 23, 24

TABLE OF AUTHORITIES – Continued

Page

Joseph Story, *Commentaries on Equity Jurisprudence* §1219 (1st Eng. ed. 1884) 9

Note, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 Va. L. Rev. 165 (1990) 28

Restatement of Restitution §160 (1937) 23

Restatement (Second) of Trusts, §1 (1937) 23

S. Rep. No. 225, 98th Cong., 2d Sess. 193 (1983), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182 ..... 16, 19, 20

Steven L. Schwarcz & Alan E. Rothman, *Civil Forfeiture: A Higher Form of Commercial Law?*, 62 Fordham L. Rev. 287 (1993) 15

Thomas J. Lueck, *Port Jefferson Auto Dealer Forfeits Most of His Assets*, N.Y. Times, May 20, 1992, at B1, B5 13

129 Cong. Rec. 53989 (1983) 10

No. _____

In The

Supreme Court of the United States

October Term, 1994

SHRICHAND CHAWLA, LEO D. CURRAN, WILLY HERMANS, RED CIRCLE INVESTMENT, LTD., JALEH KHORASSANCHY, AMIT PANDYA, SOHA, INC., IDRISS DEVCO, INC., and S&L GENTRADE, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners herein respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this RICO forfeiture action on February 14, 1995.

OPINIONS BELOW

The decision of the court of appeals is reported at 46 F.3d 1185 (D.C. Cir. 1995). *See* A-1 through A-16. The decision of the district court is reported at 833 F. Supp. 9 (D.D.C. 1993). *See* A-17 through A-34. Pursuant to Supreme Court Rule 14.1(k)(ii), a district court decision in a related case, *In re Bank of Credit and Commerce Int'l Depositors Litig.*, MDL Docket No. 908, is reported at 15 RICO L. Rptr. 1234 (C.D.

Cal. May 20, 1992), *aff'd*, No. 92-56085, 1995 U.S. App. LEXIS 7693 (9th Cir. Apr. 7, 1995) (petition for rehearing and suggestion for rehearing *en banc* filed on Apr. 21, 1995). *See* A-35 through A-72.

BASIS FOR JURISDICTION

The final judgment of the court of appeals was entered in this case on February 14, 1995. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1963(l) of RICO provides:

> (l)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.
>
> (2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.
>
> (3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portion of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that –

(A) *the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section*; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the

> period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

18 U.S.C. §1963(l) (emphasis added).

STATEMENT OF THE CASE

A. BCCI's Seizure, Guilty Plea And Liquidation

Petitioners, who are American citizens and residents, represent a class of nearly one million worldwide depositors who lost at least $8 billion in July 1991 when bank regulators in the United States (and other countries) seized and shut down the operations of the four principal financial institutions that collectively made up the RICO criminal enterprise known as BCCI.[1] These regulatory measures, prompted by conclusive evidence of BCCI's insolvency and extensive dealings in criminal affairs, were followed by the appointment of fiduciaries for BCCI by courts in Luxembourg and the Cayman Islands, the jurisdictions in which the principal entities were incorporated. A worldwide effort was then begun to consolidate all BCCI assets wherever located for distribution to creditors. A-3.

BCCI's collapse prompted a flurry of civil and criminal investigations by various state and federal agencies in the United States and criminal charges were brought against BCCI in several jurisdictions. On November 15, 1991, the government filed an indictment against BCCI charging it with various crimes, including violations of RICO, wire fraud and conspiracy. Negotiations between law enforcement officials and the court-appointed BCCI fiduciaries ultimately led to a

---

[1] These four organizations were BCCI Holdings (Luxembourg), S.A., Bank of Credit and Commerce International (Luxembourg), S.A., Bank of Credit and Commerce International (Overseas) Limited, and International Credit and Investment Company (Overseas) Limited. At the time of the shutdown, these BCCI companies had operations in 69 countries. A-2 to A-3.

plea agreement filed with the federal district court in the District of Columbia. The agreement required BCCI to plead guilty to several state and federal criminal and civil charges, including violations of RICO, 18 U.S.C. §§1961-1968, and to forfeit to the Justice Department all BCCI assets located in the United States. It also provided, pursuant to RICO, that one-half of all sums recovered by the government would be devoted to reimbursing BCCI's defrauded depositors; the other half was to be reserved for the Attorney General's discretionary allocation among several enumerated purposes, which included offsetting losses to "the Bank Insurance Fund of the FDIC and United States taxpayers" resulting from BCCI's collapse and making further contributions to the global liquidation fund. The plea agreement, with its RICO forfeiture provision, was approved by supervising courts in Luxembourg and the Cayman Islands and the district court formally accepted the plea agreement on January 24, 1992. A-3 to A-4.

B. BCCI Forfeiture Proceedings

Shortly thereafter, pursuant to §1963(l) of RICO, the district court issued the first of several orders forfeiting all identified BCCI property located within the United States; later forfeiture orders were issued by the district court in response to the discovery of additional assets. The forfeited amount – in aggregate approximately $522 million – largely came from bank accounts maintained at various United States banks in the names of specific overseas branches of BCCI. Following the district court's issuance of the forfeiture orders, numerous third parties, Petitioners among them, filed petitions claiming legal interests in the BCCI assets forfeited to the government pursuant to §1963(l) of RICO. A-4.

Under RICO, third parties may challenge a forfeiture order if they can assert that they have a "legal interest in property which has been ordered forfeited." 18 U.S.C. §1963(l)(2). A party who files a petition alleging a legal interest that, if established, would compel amendment of the forfeiture is then entitled to a hearing, *see id.* at A-5, during

which the petitioner is entitled to present evidence, including testimony from witnesses. 18 U.S.C. §1963(l)(5). Section 1963(l)(6) sets forth the alternative grounds upon which the district court may grant relief:

> If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that –
>
> (A) *the petitioner has a legal right, title, or interest renders the order of forfeiture invalid in whole or in part becuase the right, title, or interest in the property, and such right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section;* or
>
> (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;
>
> the court shall amend the order of forfeiture in accordance with its determination.

18 U.S.C. §1963(l)(6) (emphasis added). In the courts below Petitioners sought relief under *both* subsections of §1963(l)(6), to no avail. A-6.

C. The Hamid Class Action

After the collapse and seizure of BCCI and the concomitant loss of their multi-billion dollar deposits, in August 1991, Petitioners filed a RICO class action in the United States District Court for the Central District of California against BCCI's founders, officers and directors, as well as the attorneys, accountants and numerous related third parties who actively and knowingly assisted in the massive fraudulent scheme that fraudulently induced Petitioners deposits and then deprived them of their money while BCCI operated for

many years as an illegal RICO enterprise.[2] Petitioners' 482-page amended complaint (accompanied by 2,003 pages of exhibits, including copies of criminal indictments, guilty pleas and U.S. Senate and other government investigative reports detailing defendants' wrongdoing), which was filed in the California federal district court on January 30, 1992, contained detailed allegations concerning BCCI's involvement in numerous criminal activities, regulatory violations stemming from BCCI's secret ownership and control of several U.S. financial institutions, and the worldwide fraud perpetrated upon depositors that ultimately ended in BCCI's financial collapse and the concomitant loss of their deposits.

In the *Hamid* Class Action, depositors alleged that defendants' fraudulent scheme caused them to lose billions of dollars in deposits because (1) depositors were defrauded into placing their deposits into the various parts of a criminal enterprise, instead of a legitimate banking enterprise, because BCCI and its insiders falsely represented that it had substantial assets, profitability and lawful operations and would be able to honor depositors' claims; (2) the ongoing existence of the BCCI criminal banking enterprise would not have been possible had the defendants (including BCCI's attorneys and accountants) not helped BCCI continue to operate by failing to publicly disclose its true nature and actively assisting it to avoid detection by regulators; (3) as a continuing operation, the BCCI criminal banking enterprise continued to fraudulently accept depositors' money; and (4) because of defendants' racketeering acts (which constituted the operation of BCCI), bank regulators seized BCCI on July 5, 1991, freezing depositors' funds and precipitating their multi-billion dollar losses. A-41 to A-42. In May 1992, however, the district court dismissed the *Hamid* Class Action complaint on standing grounds, incorrectly holding that the defrauded depositors'

---

[2] *In re Bank of Credit and Commerce Int'l Depositors Litig.*, Docket No. MDL-908; *Hamid v. Price Waterhouse & Co.*, Case No. CV 91-4483 CBM(Ex) (C.D. Cal. Class Action Complaint filed on Aug. 21, 1991) ("*Hamid* Class Action"). *See* A-39 to A-40.

claims were "derivative" of BCCI rather than direct and that their injuries were not ripe because all or part of their claims might be eventually satisfied through BCCI's foreign liquidation proceedings. That decision was recently affirmed by the Ninth Circuit Court of Appeals, where the depositors' petition for rehearing and suggestion for rehearing *en banc* is currently pending.[3]

D. Proceedings In The Courts Below

1. Petitioners' Section 1963(l) Petitions

As noted above, as part of its criminal plea bargain, BCCI forfeited its ownership interest in all BCCI property located in the U.S. The majority of this property consisted of deposit accounts maintained in various U.S. banks by specifically identified BCCI branches and other BCCI entities. Pursuant to §1963(l)(2) of RICO, in March, 1992 Petitioners filed their third-party petition in the U.S. District Court for the District of Columbia, claiming legal interests in the hundreds of millions of dollars of BCCI assets forfeited to the government. Representing subclasses of depositors who deposited funds in those identified branches (or whose deposited funds can otherwise be traced to those accounts) and specifically incorporating by reference the massive (482-

---

[3] *In re Bank of Credit and Commerce Int'l Depositors Litig.*, 15 RICO L. Rptr. 1234, 1241-43, 1251 (C.D. Cal. May 20, 1992), *aff'd*, No. 92-56085, 1995 U.S. App. LEXIS 7693 (9th Cir. Apr. 7, 1995) (petition for rehearing and suggestion for rehearing *en banc* filed on Apr. 21, 1995); *see* A-50 to A-55. While the general rule is that a person does not have standing to complain about injury to another, where they are, in fact, also a *target* of a fraudulent scheme, they do have standing under §1964(c) of RICO. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 112 S. Ct. 1311, 1320 & n.19 (1992) (brokerage/customer); *GICC Capital Corp. v. Technology Fin. Group*, 30 F.3d 289, 293 (2d Cir. 1994) (debtor/creditor); *Ceribelli v. Elghanayan*, 990 F.2d 62, 64-65 (2d Cir. 1993) (cooperative/owner); *In re EDC*, 930 F.2d 1275, 1279 (7th Cir. 1991) (debtor/creditor); *Ocean Energy II, Inc. v. Alexander & Alexander*, 868 F.2d 740, 743-46 (5th Cir. 1989) (corporation/insurer).

page) amended complaint which they had filed in the *Hamid* Class Action, Petitioners asserted that the various depositor subclasses had been defrauded by BCCI and its insiders. Because their deposited funds were obtained by fraud, under well-developed principles of law, the depositors asserted that they were entitled to imposition of a constructive trust on the forfeited accounts, which interest is superior to BCCI's illegal interest and, therefore, superior to the government's derivative interest obtained only through forfeiture under §1963(l)(6)(A) of RICO.[4] A-6 to A-7. As a result, Petitioners adequately pled both standing, as required by §1963(l)(2), and a protected property interest within the meaning of §1963(l)(6)(A).

---

[4] In the court below, the government contended that the validity of Petitioners' constructive trust theory was a matter of federal law; in fact, the issue turns on state (or other) law as it is incorporated into federal law. *See Ocean Energy II*, 868 F.2d at 743-46. In addition, while Petitioners' "right, title, or interest" in the forfeited property was termed a "constructive trust" in the court below, it must just as easily be termed an "equitable lien" or "an action for money had and received" because these claims are traditionally alternative theories of legally recovering money taken by fraud. *See, e.g., Provencher v. Berman*, 699 F.2d 568, 569-70 (1st Cir. 1983) (Breyer, J.) (defendant's fraud gives rise to either an equitable lien or a constructive trust in favor of plaintiff; following Massachusetts law but recognizing this to be the "virtually universal rule"); Joseph Story, *Commentaries on Equity Jurisprudence* §1219 (1st Eng. ed. 1884) ("The principle upon which courts of equity have proceeded in establishing [an equitable] lien, in the nature of a trust is, that a person . . . ought not, in conscience, as between them, be allowed to keep it. . . . "). *Walker v. The Ware, Hadhan & Buntingford Ry. Co.*, 1 Equity Cas. 195, 199 (1865) (equitable lien: "[I]t is said the enforcement of the lien would interfere with the rights of the public [in the railroad]. . . . [B]ut can it be said that a railway company may take a man's land [by condemnation] without paying for it and when he seeks to enforce payment . . . set up as a defense the rights of the public? . . . The public . . . cannot be interested in having a man deprived of his property."). The validity of whichever theory is adopted, however, is not before this Court and must await the statutorily mandated evidentiary hearing in the court below.

2. The District Court's Decision

In its August 19, 1993 decision, after denying Petitioners the evidentiary hearing guaranteed by §1963(l)(2) and (5), the district court summarily dismissed their claims. While recognizing that the beneficiaries of a constructive trust have standing to challenge a forfeiture under §1963(l), the district court nevertheless ruled that the imposition of a constructive trust in favor of the Petitioners would be "inappropriate." A-27.[5]

3. The Court Of Appeals' Decision

On appeal, the District of Columbia Circuit (Silberman, Henderson & Randolph, JJ.) affirmed the district court's decision, although on different grounds. The court of appeals was unpersuaded by the government's attempt to label Petitioner's entitlement to the forfeited funds as "equitable," such that it could not be recognized under §1963(l)(6)(A) as a "*legal* right, title, or interest," A-9 (emphasis added), thus, the court "rejected the notion that Congress intended to draw the ancient, but largely ignored, distinction between technically

---

[5] The district court opinion in this case suffered its own unique errors distinct from those of the circuit court's opinion. Rather than simply determining, as required by §1963, whether Petitioners were entitled to a *hearing* to present evidence, and argue their case, the district court ruled directly on the *merits* of the petitions, without allowing Petitioners the opportunity to present evidence. Ignoring the due process concerns that troubled Congress when it enacted §1963, the district court decision stands for the proposition that a court may reject even *adequately pleaded* property claims of innocent third parties without the benefit of a constitutionally adequate hearing, including consideration of a petitioner's evidence and arguments. *See United States v. $38,000.00 in United States Currency*, 816 F.2d 1538, 1547 (11th Cir. 1987) ("the burden on the government to adhere to procedural rules should be heavier than on claimants"); 129 Cong. Rec. 53989 (introduction of S. 948, the Comprehensive Forfeiture Act of 1983) (Sen. Biden) (legislation must "provide for [the] orderly consideration of third party claims, taking into account the requirements of due process").

legal and technically equitable claims in forfeiture challenges." A-10 (citations omitted). Nevertheless, the court of appeals affirmed the summary dismissal of Petitioners' claims to BCCI's forfeited funds, holding that to prevail under §1963(l)(6)(A), the defrauded depositors must establish that their interest had "vested" or was "superior" to BCCI's "at the time" of the commission of the acts (RICO violations) that gave rise to the forfeiture. A-11 (quoting 18 U.S.C. §1963(l)(6)(A)).

The District of Columbia Circuit rejected the reasoning of the Second, Third, Fourth, Sixth and Seventh Circuits, which had previously held that a constructive trust can be interposed as *superior* to the government's forfeiture claim under §1963(l)(6)(A) of RICO, or equivalent criminal forfeiture statutes.[6] The court below reasoned that "[w]hile those courts . . . properly rejected the government's legal/equitable distinction, they did not consider whether a judicially imposed constructive trust would be inconsistent with the statutory remedial scheme." A-12. Thus, Judge Silberman's opinion adopted a distinction not even urged by the government, and construed RICO's forfeiture provision in a manner

---

[6] *See, e.g., United States v. Schwimmer*, 968 F.2d 1570, 1582 (2d Cir. 1992) (following decisions from the Third and Fourth Circuits holding that the term "legal" in §1963(l) of RICO "should be interpreted to mean 'under the law' " and following decisions from the Sixth and Seventh Circuits holding that "a constructive trust may be a superior interest under §1963(l)(6)(A)"); *United States v. Lavin*, 942 F.2d 177, 187 (3d Cir. 1991) (same – construing §853(n)(6) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §853(n)(6)); *United States v. Campos*, 859 F.2d 1233, 1238-39 (6th Cir. 1988) (explicitly stating in *dicta* that a "constructive" trust would qualify as "superior" under §853(n)(6)); *United States v. Marx*, 844 F.2d 1303, 1308 (7th Cir. 1988) (holding that a constructive trust warrants a remission of a forfeiture order under §853(n)(6)(A)); *United States v. Reckmeyer*, 836 F.2d 200, 205 (4th Cir. 1987) (adopting broad view of "legal interest" for purpose of §853(n)(6)); *see also Torres v. $36,256.80 U.S. Currency*, 25 F.3d 1154, 1158-59 (2d Cir. 1994) (same – construing 21 U.S.C. §881). District court decisions are in accord. *See, e.g., County of Oakland v. Vista Disposal*, 826 F. Supp. 218, 223 (E.D. Mich. 1993).

that is clearly inconsistent with basic principles of statutory interpretation mandating the avoidance of unconstitutional constructions of statutes, the intent of Congress reflected in statutory text, this Court's recent interpretation of the common law relation-back doctrine, the considered judgments of sister circuit courts, and centuries of common law jurisprudence establishing well-settled principles governing constructive trusts and related legal doctrines:

> Congress intended that as far as §1963(l)(6)(A) is concerned, a third party's claim is to be measured not as it might appear at the time of litigation, but rather as it existed at the time the illegal acts were committed. A constructive trust is a *remedy* that a court devises after litigation. It is, as we have noted, a fictional trust – not a real one. It could not have been shown to exist at the time the acts were committed. Moreover, Congress provided under §1963(c) of the RICO forfeiture Act that title in all criminally acquired property of the defendant is deemed to "vest[ ] in the United States upon the commission of the act giving rise to forfeiture." Congress, in other words, devised a statutory remedial scheme that reaches *back to the time of the criminal acts* to forfeit the property to the United States. The statute thus creates a retroactive legal fiction similar to a constructive trust for the benefit of the United States. It is not open to a court to fashion another remedy (a competing fiction) that also reaches back to snatch the property away from the United States – which is exactly what a constructive trust would do.

A-11 to A-12 (emphasis in original).

As set forth below, the District of Columbia Circuit's decision in this case is not only in conflict with this Court's recent forfeiture decisions and other circuit court decisions on these important legal issues, but its reasoning misconstrues RICO's statutory language to the detriment of innocent third parties for whose express protection §1963(l) of RICO was added by amendment in 1984. Moreover, the circuit court's

decision permits the government to gain an improper advantage through a plea bargained forfeiture with BCCI, the insolvent perpetrator of a massive financial fraud, that Congress specifically eschewed in the context of basic bankruptcy law.[7]

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because this case presents important issues of first impression in this Court concerning the proper construction and application of §1963(l) of RICO in forfeiture proceedings implicating the rights of innocent third parties. The decision of the District of Columbia Circuit in this case is not only in conflict with previous decisions from the Second, Third, Fourth, Sixth and Seventh Circuits, but it also misconstrues the well-developed common law of constructive trusts. In addition, the decision of the court below ignores basic principles of statutory interpretation that counsel caution when statutes collide with well-settled constitutional doctrines, the pertinent statutory provisions themselves, as well as RICO's salutary purpose: to permit innocent victims, including the hundreds of thousands of BCCI's defrauded depositors, to recover their stolen property from forfeited assets and to enforce provisions of a criminal plea agreement that were expressly intended for their benefit.

This case presents important legal issues involving forfeitures in the context of the second largest forfeiture proceeding in the history of this country.[8] It presents this Court

---

[7] Had the government not seized BCCI's assets, but sought to enforce its forfeiture order in a bankruptcy proceeding, its distribution priority would have been *fourth*. 11 U.S.C. §726(a)(4). Unsecured creditors are third. 11 U.S.C. §726(a)(3). *See In re Ryan*, 15 B.R. 514 (Bankr. D. Md. 1981).

[8] The largest civil forfeiture action was junk bond king (and convicted felon) Michael Milken's forfeiture of $900 million to the Securities and Exchange Commission. *See* Thomas J. Lueck, *Port Jefferson Auto Dealer Forfeits Most of His Assets*, N.Y. Times, May 20, 1992, at B1, B5.

with an opportunity, consistent with its decisions in the complex area of forfeiture law,[9] to address yet another inequity[10]

---

[9] In several recent forfeiture cases, this Court has taken the government to task for its overzealous and unfair enforcement of federal statutes allowing forfeiture of assets. *See, e.g., United States v. James Daniel Good Real Property*, ___ U.S. ___, 114 S. Ct. 492, 505 (1993) (holding that the Due Process Clause requires the government to afford notice and an opportunity to be heard before seizing real property subject to civil forfeiture); *Austin v. United States*, ___ U.S. ___, 113 S. Ct. 2801, 2803 (1993) (looking past guilty-property fiction and holding that civil forfeitures may constitute Excessive Fines under the Eighth Amendment); *United States v. 92 Buena Vista Ave.*, ___ U.S. ___, 113 S. Ct. 1126, 1135-36 (1993) (plurality opinion holding that donees and other post-illegal act transferees of forfeitable property may claim protection under the "innocent owner" defense); *Republic Nat'l Bank v. United States*, ___ U.S. ___, 113 S. Ct. 554, 562 (1992) (government cannot deprive the appellate court of jurisdiction by transferring forfeited property out of judicial district). *Cf. Department of Revenue v. Kurth Ranch*, ___ U.S. ___, 114 S. Ct. 1937, 1945 (1994) ("A defendant convicted and punished for an offense may not have a nonremedial civil penalty imposed against him for the same offense in a separate proceeding.") (citation omitted). *See also United States v. Libretti*, 38 F.3d 523 (10th Cir. 1994) (right to jury trial in forfeiture proceeding extends to guilty plea), *cert. granted*, No. 94-7427, 1995 U.S. LEXIS 2258 (Mar. 27, 1995).

[10] In the words of one respected commentator on the law of civil and criminal forfeitures:

> The government's overzealous forfeiture efforts are being criticized by the courts, the media, legal commentators, bar associations, civil liberties organizations, some members of Congress, and even by the prosecutors responsible for leading and directing the federal forfeiture program. We are witnessing a major swing of the law enforcement pendulum. After years of relentless expansion, our forfeiture laws are in for a long overdue review by the courts, legislatures and the Clinton Department of Justice. There is a widely perceived need to reform these laws and the way they are being implemented to make them fairer and to prevent the kinds of abuses that have occurred.

1 David B. Smith, *Prosecution and Defense of Forfeiture Cases*, ¶1.02, at 1-19 (1985 & Supp. 1994). *See also James Daniel Good Real Property*,

in the construction and administration of such statutes.[11]

I. THIS CASE PRESENTS IMPORTANT QUESTIONS OF LAW CONCERNING INNOCENT THIRD PARTIES' RIGHTS IN RICO FORFEITURE CASES AND REVIEW BY THIS COURT IS NECESSARY TO RESOLVE A SPLIT IN THE CIRCUITS AS TO THE PROPER CONSTRUCTION AND APPLICATION OF SECTION 1963(l)(6)(A) OF RICO

A. The Purpose And Construction Of Section 1963(l) Of RICO

This case represents the first instance in which this Court will construe and apply §1963(l) of RICO, which governs innocent victims' (and other third parties') rights in criminal forfeiture

---

114 S. Ct. at 515 (Thomas, J., concurring in part, dissenting in part); *United States v. $191,910.00 in U.S. Currency*, 16 F.3d 1051, 1068-69 (9th Cir. 1994); *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2d Cir. 1992); Steven L. Schwarcz & Alan E. Rothman, *Civil Forfeiture: A Higher Form of Commercial Law?*, 62 Fordham L. Rev. 287 (1993).

[11] Currently, forfeiture is authorized by more than 100 federal statutes providing for confiscation of everything from diseased poultry, *see* 21 U.S.C. §467b(a), to pornographic magazines, *see* 18 U.S.C. §1466. Examples of non-drug related civil forfeiture statutes include 18 U.S.C. §981 (forfeiture of any property involved in illegal money laundering transactions); 18 U.S.C. §512 (forfeiture of vehicles that have removed, obliterated, or altered identification numbers); 18 U.S.C. §1955(d) (forfeiture of any property used in conducting an illegal gambling business); 18 U.S.C. §2254 (forfeiture of objects depicting minors engaged in sexually explicit conduct). Additionally, a number of criminal forfeiture statutes are codified in various titles of the U.S. Code, including RICO, *see* 18 U.S.C. §1963. *See generally* Comment, *RICO Forfeiture: Secured Lenders Beware*, 37 UCLA L. Rev. 1199, 1204 & n.26 (1990) ("Comment, *RICO Forfeiture*") (collecting federal statutes).

The distinction between civil and criminal forfeiture is historical. "Upon this point a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.). In essence, civil forfeiture is an *in rem* proceeding against the property, while criminal

proceedings instituted by the government.[12] Although RICO was enacted in 1970, prior to 1984, third parties (such as Petitioners) were not statutorily entitled to challenge criminal forfeitures arising under §1963 of the statute. *Reckmeyer*, 836 F.2d at 207; *United States v. L'Hoste*, 609 F.2d 796, 812 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980).[13] Thus, where the property of an innocent third

---

forfeiture is an *in personam* proceeding against the defendant in which forfeiture of the property is imposed as a penalty. Forfeiture constitutes a significant source of government revenues and, since 1985, the Asset Forfeiture Fund of the Department of Justice has recovered $3.5 billion. *See Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations for 1995, Hearings Before the House Subcomm. on Appropriations*, 103rd Cong., 2d Sess. 781 (1994) (testimony of Dep. Atty. Gen. Cary H. Copeland).

[12] RICO mandates forfeiture of all assets a defendant has acquired through a pattern of racketeering activity. Section 1963(a) directs that any person who acquires, controls, or conducts the affairs of an enterprise through a pattern of racketeering activity or the collection of an unlawful debt shall forfeit to the government any interest acquired through racketeering, any property right affording a source of influence over a RICO enterprise, and any property constituting proceeds of racketeering activity. *See Alexander v. United States*, ___ U.S. ___, 113 S. Ct. 2766 (1993); *United States v. Monsanto*, 491 U.S. 600 (1989); *see also Russello v. United States*, 464 U.S. 16, 21 (1983) (the term "interest" in §1963(a)(1) includes profits and proceeds). Thus, criminal *in personam* forfeiture under RICO has several interrelated purposes. First, it deprives the racketeer of property acquired through any illegal activity on the theory that a person should not be allowed to profit from crime. Comment, *RICO Forfeiture*, 37 UCLA L. Rev. at 1207. Second, by separating a RICO violator from ill-gotten gains, forfeiture prevents the violator both from delegating criminal activities to a colleague while in prison and from resuming the activities once the violator has served his sentence. *See* Senate Committee on the Judiciary, *Organized Crime Control Act of 1969*, S. Rep. No. 617, 91st Cong., 1st Sess. 80 (1969). Third, *in personam* forfeiture provides the government with revenue to be used in its fight against crime. *Caplin & Drysdale v. United States*, 491 U.S. 617, 629 (1989).

[13] In 1983, Congress recognized the historical roots of criminal forfeiture in the English common law, *see* S. Rep. No. 225, 98th Cong., 2d Sess. 193 (1983), *reprinted in* 1984 U.S. Code Cong. & Admin. News

party was ordered forfeited to the government in a RICO case, that party's only remedy was to petition the Attorney General for relief, as the court of appeals recognized in this case. A-9; *see also Lavin*, 942 F.2d at 185; *United States v. Delco Wire & Cable Co.*, 772 F. Supp. 1511, 1515-16 (E.D. Pa. 1991). The Attorney General's decision to grant or deny relief was entirely discretionary and was not subject to judicial review. *Id.*; *see also L'Hoste*, 609 F.2d at 812.

This procedure raised due process concerns in the Congress and among the bar as to the court's power to exercise jurisdiction over property that belonged to a party not before the court, particularly property belonging to an innocent party not subject to criminal indictment.[14] Recognizing that a third party has a due

---

3182, 3376 ("S. Rep. No. 225") ("criminal forfeiture . . . has its origins in ancient English common law"), but traditionally it was disfavored in this country. *United States v. Cauble*, 706 F.2d 1322, 1345 & nn. 84-85 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984). The RICO forfeiture provision, codified as 18 U.S.C. §1963, is the second piece of criminal forfeiture law that Congress has authorized. *Id.* Subsequently, but in the same year when RICO was passed, Congress provided a similar criminal forfeiture mechanism in the Continuing Criminal Enterprise Act ("CCE"), codified as and amended at 21 U.S.C. §§848, 853, to combat drug trafficking. *See United States v. Pelullo*, 14 F.3d 881, 902 (3d Cir. 1994).

[14] Petitioners were not parties to the criminal proceeding in which BCCI pled guilty to RICO violations. In the words of this Court, "[i]t is elementary that one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 110 (1969); *see also United States v. Kramer*, 912 F.2d 1257, 1261 (11th Cir. 1990) (third parties are not bound by criminal *in personam* forfeiture verdicts). To extinguish Petitioners' legal rights required not only notice and a hearing, but appropriate procedural protections. Because the government seized BCCI's property, the proceedings were not like a bill of peace, which is equitable in character, but like an action for ejectment, which is legal in character; accordingly, Petitioners were entitled to a jury trial under the Seventh Amendment. *Compare Chauffeurs Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990) (Seventh Amendment right to jury trial governed by history and nature of remedy sought) *with Humble Oil & Refining Co. v. Sun Oil Co.*,

process right to protect its property, Congress acted to correct this statutory failing and, in 1984, it amended §1963 of RICO to provide for an evidentiary hearing at which a party could establish the validity of its interest in such property.[15] *See* A-10 to A-11

---

191 F.2d 705, 717-21 (5th Cir. 1951) (ejectment and bill of peace in possession and out of possession compared), *cert. denied*, 342 U.S. 920 (1952). Even *in rem* forfeitures may impose jury trial obligations. *See United States v. One 1976 Mercedes Benz*, 618 F.2d 453, 456-58 (7th Cir. 1980) (if personalty is seized on land, a jury trial is required).

Statutes should be construed under well-settled rules of interpretation in order to avoid constitutional issues. *New York v. United States*, ___ U.S. ___, 112 S. Ct. 2408, 2425 (1992). Thus, §1963 of RICO ought not to be read to deprive an innocent party of its interest in property without notice, hearing, or other procedural protection. In *Peisch v. Ware*, 8 U.S. (4 Cranch.) 347 (1808), where the removal of the goods from the custody of the revenue officer occurred not by theft or robbery but pursuant to a writ of replevin issued by a state court, *id.* at 360, Chief Justice Marshall construed a civil *in rem* forfeiture statute to protect basic property rights, pertinently stating that "[i]f, by private theft, or open robbery, without any fault on his part, his property should be invaded . . . the law cannot be understood to punish him with the forfeiture of that property." *Id.* at 364. Thus, *Peisch* stands for the general principle that "the law is not understood to forfeit the property of owners or consignees, on account of the misconduct of mere strangers, over whom such owners or consignees could have no control." *Id.* at 365. Here, too, this Court should read RICO to protect – not violate – third party rights. *See Austin*, 113 S. Ct. at 2809 (question "expressly reserved" whether "truly innocent owner's" rights could be forfeited *in rem*) (citing *J. W. Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 512 (1921), and *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90 (1974)). The Constitution requires more – not fewer – rights when a forfeiture proceeding is *in personam*.

[15] In 1984, Congress enacted the Comprehensive Forfeiture Act of 1984, Pub. L. 98-473, Title II, Ch. III, 98 Stat. 2040, to amend the RICO and CCE forfeiture provisions. *See Pelullo*, 14 F.3d at 902. With respect to RICO's forfeiture provisions, §302 of the act added a subsection to §1963 (now subsection (l)) in order to provide for ancillary proceedings for third parties to claim any interest in the forfeited property and to specify that third parties have the burden to prove their interest by a mere preponderance of the evidence. 98 Stat. 2043-44; *see also Pelullo*, 14 F.3d at 902. The statutory amendment also guaranteed an evidentiary hearing, *see* 18

("[§]1963(l) was added to alleviate due process concerns; obviously, only the property of the defendant (including property held by a third party pursuant to a voidable transaction) can be confiscated in a RICO proceeding.") (citing S. Rep. No. 225 at 208, *reprinted in* 1984 U.S. Code Cong. & Admin. News at 3391);[16] *see also Kramer*, 912 F.2d at 1260; *Reckmeyer*, 836 F.2d at 207; *County of Oakland*, 826 F. Supp. at 222.

Thus, in subsections (A) and (B) of §1963(l)(6), Congress afforded two categories of third parties standing to petition the courts to determine the validity of their claims to forfeited assets. Standing to petition exists

---

U.S.C. §1963(l)(5), which, as noted above, the district court denied to Petitioners in this case.

[16] In discussing proposed §1963(l), the Senate Judiciary Committee noted that the Department of Justice had changed its position on the propriety of the remission and mitigation proceedings as the only source of relief for third parties whose property interests were compromised by an *in personam* forfeiture order and expressed its view that such third parties were entitled to judicial review of their claims:

> Criminal forfeiture is an *in personam* proceeding. Thus, an order of forfeiture may reach only property of the defendant, save in those instances where a transfer to a third party is voidable. Thus, if a third party can demonstrate that his interest in the forfeited property is exclusive of or superior to the interest of the defendant, the third party's claim renders that portion of the order of forfeiture reaching his interests invalid. The Committee strongly agrees with the Department of Justice that such third parties are entitled to judicial resolution of their claims.

S. Rep. No. 225 at 208, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3391; *see also Schwimmer*, 968 F.2d at 1580; *Reckmeyer*, 836 F.2d at 207-08; Hearings Before the Subcommittee on Crime of Committee on the Judiciary, House of Representatives, 98th Cong., 1st Sess., on H.R. 3272, H.R. 3299, and H.R. 3725, Comprehensive Drug Penalty Act, 4-16, 15 (1983) (testimony of James Knapp, Dep. Ass't Atty. Gen., Criminal Division, suggesting that judicial resolution is appropriate for third parties whose interests are "by their very nature inconsistent with the order of forfeiture").

> first, where the petitioner had a legal interest in the property that, at the time of the commission of the acts giving rise to the forfeiture, was vested in him rather than the defendant or was superior to the interest of the defendant; or second, where the petitioner acquired his legal interest after the acts giving rise to the forfeiture but did so in the context of a *bona fide* purchase for value and had no reason to believe that the property was subject to forfeiture.

S. Rep. No. 225 at 209, *reprinted in* 1984 U.S. Code Cong. & Admin. News at 3392. According to the Third Circuit, "Congress derived both exceptions essentially from hornbook commercial law." *Lavin*, 942 F.2d at 185. The first exception, codified in §1963(l)(6)(A), reflects the common law principle, embodied in the venerable maxim *nemo dat qui non habet*,[17] that a buyer acquires no better title than that of the seller. *Id.* Under the so-called "relation-back" doctrine utilized in criminal forfeiture cases, *see 92 Buena Vista Ave.*, 113 S. Ct. at 1135-36 (plurality op.), the government asserts that it acquired its interest in the defendant's forfeited property at the time of the commission of the criminal acts giving rise to the forfeiture order. *See* A-4. Nevertheless, "if a third party's interest in the forfeited property, at the time of the criminal acts, was superior to the criminal defendant's interest, then the interest that the government acquires when it steps into the defendant's shoes is subordinate to that of the third party." *Lavin*, 942 F.2d at 185. *Accord County of Oakland*, 826 F. Supp. at 223-24.

While the District of Columbia Circuit acknowledged this exception to the relation-back doctrine (while simultaneously ignoring the severe limitations on the doctrine imposed by this Court in *92 Buena Vista Ave.*, 113 S. Ct. at 1135-36), *see* A-11, it grossly mischaracterized the nature of a constructive trust – the right, title, or interest asserted by Petitioners – when it wrongly stated that "[i]t could not have been shown to exist at the time the [illegal] acts were committed" by BCCI. A-12. Under well-settled law, Petitioners' constructive trust (or equitable lien) came into

---

[17] "He who hath not cannot give." *Black's Law Dictionary* 1037 (6th ed. 1990).

existence when they were defrauded into depositing their money into BCCI, a criminal enterprise. As such, their right, title, or interest in BCCI's forfeited property would *always* be superior to whatever derivative interest the government acquired when BCCI *subsequently* used Petitioners' deposits – in some cases, years later – to finance criminal acts, such as illegally infiltrating U.S. financial institutions, which predicate acts furnished the basis for BCCI's 1992 RICO guilty plea and the forfeiture order at issue here.

B. The Constructive Trust Asserted By Petitioners In BCCI's Forfeited Funds Is A Legal Interest That Is Superior To The Criminal Defendant's Right, Title, Or Interest Therein And, Therefore, It Is Superior To The Government's Derivative Interest

After discussing the metaphysical differences between "legal" and "equitable" interests, *see* A-8 to A-10, the court of appeals stated that "we agree with our sister circuits that have rejected the notion that Congress intended to draw the ancient, but largely ignored, distinction between technically legal and technically equitable claims in forfeiture challenges," A-10 (citing *Schwimmer*, 968 F.2d at 1582; *Lavin*, 942 F.2d at 185 n.10; and *Campos*, 859 F.2d at 1238-39), because "[i]t seems to us that it would just as much offend notions of due process for the government to scoop up property in which a third party has certain kinds of equitable interests as it would for the government to take property in which a third party has a 'legal' interest" and "focusing on the distinction between equitable and legal interests obscures Congress' real intent." A-11. Nevertheless, while the court below acknowledged that the constructive trust asserted by Petitioners over BCCI's forfeited funds is a "legal right, title, or interest" clearly intended by Congress to be protected under §1963(l)(6)(A), it misconstrued the indisputable character of a constructive trust (or an equitable lien) and RICO's language and statutory purpose in holding that Petitioner's interest in BCCI's forfeited assets had not "vested" or was not "superior" to BCCI's interest therein when BCCI committed the criminal acts which gave rise to the 1992 RICO guilty plea and forfeiture order. A-11 to A-12.

To prevail under §1963(l)(6)(A), Petitioners must assert an interest in the forfeited funds that is *superior* to BCCI's interest at the time of the commission of its RICO predicate acts; however, in the words of the Sixth Circuit, "[s]uch a *superior* interest would clearly be one in the nature of a *lien*, mortgage, recorded security device, *constructive trust*, valid assignment, or the like." *Campos*, 859 F.2d at 1238-39 (later emphasis added). *Accord Marx*, 844 F.2d at 1307-08 (holding that a constructive trust warrants a remission under 21 U.S.C. §853(n)(6)(A)); *Schwimmer*, 968 F.2d at 1581-82 (following *Campos* and *Marx* and holding that "a constructive trust may be a superior interest under §1963(l)(6)(A)"); *County of Oakland*, 826 F. Supp. at 223 ("A constructive trust is superior to the possessory interest of the wrongdoer.") (citations omitted).[18] Refusing to follow this persuasive authority from other

---

[18] Under well-settled authority that the District of Columbia Circuit ignored, when Petitioners were fraudulently induced to deposit their money into BCCI, such assets (like funds which have been embezzled or misappropriated) were obtained by wrongful means and, therefore, could not properly be considered BCCI's property. Consequently, BCCI held no legal title to these funds from the time they were deposited and in fact, held them subject to an equitable lien or as a constructive trustee in favor of Petitioners. *See SEC v. Paige*, 1985 Westlaw 2335, 1985 U.S. Tax Cas. (CCH) ¶9588, at 89,506 (D.D.C. July 30, 1985) (under general rule of common law the victim, and not the embezzler, retains title to funds), *aff'd*, 810 F.2d 307 (D.C. Cir. 1987); *United States v. Fontana*, 528 F. Supp. 137, 143 (S.D.N.Y. 1981) (same). Thus, BCCI never had property interests in the stolen money that could be forfeited to the government under RICO. *See SEC v. Levine*, 689 F. Supp. 317, 321-22 (S.D.N.Y. 1988), *aff'd in part and rev'd in part on other grounds*, 881 F.2d 1165 (2d Cir. 1989). In the words of Judge Gadola:

> [I]f it is determined that the forfeited property is in part or whole, traceable to the injury suffered by Oakland County as a victim of the RICO conspiracy, then Vista cannot be said to ever have held title to the property. Vista will be found merely to have held the property in trust for Oakland County. Therefore, Oakland County's interest in that part of the forfeited property traceable to Oakland County's injury as a victim has always been superior to Vista's interest.

County of Oakland, 826 F. Supp. at 223 (footnote omitted).

circuits, *see* A-12, the District of Columbia Circuit grossly mischaracterized the constructive trust asserted by Petitioners, stating in pertinent part that "[a] constructive trust is a *remedy* that a court devises after litigation. It is, as we have noted, a fictional trust – not a real one. *It could not have been shown to exist at the time the acts were committed*" by BCCI. *Id.* (later emphasis added).

Constructive trusts and equitable liens are long-recognized features of common law jurisprudence whose characteristics are beyond dispute. *See Moore v. Crawford*, 130 U.S. 122, 128 (1889). Speaking for the New York Court of Appeals, Justice Cardozo stated that "[a] constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee." *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 386, 122 N.E. 378, 380 (1919). Thus, "[a] court of equity may prevent the unjust enrichment of a defendant by compelling him to surrender to the plaintiff property held by him, thus enforcing a constructive trust, or by giving the plaintiff a security interest in the property held by the defendant, thus imposing an equitable lien." V Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* §463, at 331 (4th ed. 1989) ("V Scott, *Law of Trusts*") (footnote and citations omitted); *see also In re Lela & Co.*, 551 F.2d 399, 406-07 (D.C. Cir. 1977).[19] Property (such as Petitioners' deposits) obtained by fraud presents the classic case for

---

[19] Similar definitions have been expressed for centuries by the English courts, where the constructive trust and equitable lien were conceived, *see, e.g., Hussey v. Palmer*, 3 All E.R. 744, 747, 1 W.L.R. 1286 (1972); *McCormick v. Grogan*, 4 L.R.-E. & I. App. 82, 88, 97 (1869); *Rolfe v. Gregory*, 4 De G.J.&S. 576, 579 (1864), as well as by the Restatements. *See Restatement (Second) of Trusts*, §1, comment e (1959); *Restatement of Restitution* §160 (1937). *See generally* I George E. Palmer, *The Law of Restitution* §1.3, at 9-16, §1.5(a), at 20-21 (1989) (tracing the history of constructive trusts and equitable liens in England and the U.S.) ("I Palmer, *Restitution*").

imposition of a constructive trust: "[T]he acquisition of property through the fraudulent misrepresentation of a material fact has been held sufficient grounds to fasten a constructive trust on the property." *Osin v. Johnson*, 243 F.2d 653, 656 (D.C. Cir. 1957) (citation omitted); *see also Old Security Life Ins. Co. v. Continental Ill. Nat'l Bank & Trust Co.*, 740 F.2d 1384, 1397 (7th Cir. 1984); *China Fire Ins. Co. v. Davis*, 50 F.2d 389, 391 (2d Cir.) (L. Hand, J.), *cert. denied*, 284 U.S. 658 (1931). *See generally* V Scott, *Law of Trusts* §462, at 302; I Palmer, *Restitution* §§3.2-3.3, at 232-37.[20]

---

[20] Imposition of a constructive trust or equitable lien is particularly appropriate where (as here) the depositors allege that they were fraudulently induced to deposit their money into BCCI, a phony bank:

> *Even in the case of a general deposit, a bank becomes constructive trustee of the money deposited if it is guilty of fraud in obtaining the deposit.* The most common instance of such fraud occurs where the bank continues to receive deposits when it has, to the knowledge of its officers, become hopelessly insolvent. A person when he borrows money does not necessarily make any representation thereby that he is solvent. A bank, however, as long as it continues to receive deposits does in effect make a representation that it is, as far as is known to its officers, a solvent concern; when it ceases to be so it should close its doors. It is, indeed, frequently made a criminal offense on the part of its officers for the bank to continue to receive deposits when it is known by them to be insolvent. *Accordingly it has been held that a bank that receives deposits when it knows that it is hopelessly insolvent becomes a constructive trustee of the money deposited, and the depositor is entitled to priority over the general creditors of the bank,* provided that it can identify the money deposited or trace it into the assets of the bank.

V Scott, *Law of Trusts* §529, at 690-61 (emphasis added; footnote omitted). This rule has been followed in this country for over a century. *See, e.g., St. Louis & S.F.R. v. Johnston*, 133 U.S. 566 (1890); I Palmer, *Restitution* §1.5(a), at 21 ("One of the significant effects of both constructive trust and equitable lien is to give priority over the claims of general creditors when a claimant's funds are traced into the assets of an insolvent estate.").

In this case, Petitioners alleged with requisite particularity that the money they deposited in BCCI was obtained by fraud,[21] thus, they properly alleged the foundation for imposition of a constructive trust or equitable lien. But the court below engaged in its own legal fiction when it held that Petitioners' constructive trust did not arise *until* their third-party petitions were filed in the district court under §1963(l) of RICO, *see* A-11 to A-12, *when the law is clear that the constructive trust or the equitable lien arose when they were fraudulently induced to deposit their money in the BCCI banks*. The court below cited no authority in support of its conclusion that the constructive trust or equitable lien asserted by Petitioners over BCCI's funds "could not have been shown to exist at the time the [illegal] acts were committed" by BCCI. A-12. With good reason – *there is no legal authority to support the position taken by the court below in this case* and, in fact, the well-settled common law rule is to the contrary:

> *Where the title to property is acquired by one person under such circumstances that he is under a duty to surrender it, a constructive trust immediately arises.*
>
> * * *
>
> There is no doubt that where the title to property is wrongfully acquired under such circumstances

---

[21] As noted above, the amended complaint filed in the *Hamid* Class Action, which was incorporated by reference in Petitioners' §1963(l) petitions filed in the district court, detailed numerous fraudulent misrepresentations that induced depositors worldwide to place their money into BCCI accounts. Such fraudulent statements included generalized misrepresentations, such as those contained in financial statements and other published reports, as well as BCCI brochures which directly targeted potential depositors. In the courts below, the government conceded – and the district court and court of appeals assumed – that Petitioners' multi-billion dollar deposits in the BCCI banks were obtained by fraud. *See* A-40 to A-42.

> that the person acquiring it is under a duty to make restitution, the person entitled to restitution has such an interest in the property as to enable him to recover it from a person to whom the wrong-doer has transferred it, if that person is not a bona fide purchaser. This is true although the transfer is made before the person who was wronged has brought a proceeding to recover the property and long before the court has decreed restitution. *The beneficial interest in the property is from the beginning in the person who has been wronged. The constructive trust arises from the situation in which he is entitled to the remedy of restitution, and it arises as soon as that situation is created.* For this reason, the person who is wronged is entitled to specific restitution from the wrongdoer even though the wrongdoer becomes insolvent before suit is brought, and he is entitled to specific restitution from a person to whom the wrongdoer has transferred the property, if the transferee is not a bona fide purchaser, even though the transfer is made before suit is brought for restitution. *It would seem that there is no foundation whatever for the notion that a constructive trust does not arise until it is decreed by a court. It arises when the duty to make restitution arises, not when that duty is subsequently enforced.*

V Scott, *Law of Trusts* §462.4, at 322, 323-24 (emphasis added; footnote and citations omitted).[22]

The District of Columbia Circuit's mischaracterization of a constructive trust also places it in conflict with its sister circuits, which have uniformly held (usually in the bankruptcy context) that *a constructive trust arises when the*

---

[22] The Second Circuit explicitly followed this treatise in *Schwimmer*, 968 F.2d at 1584, when it recognized that third parties' constructive trust may be superior to the government's interest under §1963(l)(6)(A) and remanded the case to the district court of a tracing inquiry.

fraudulent acts (here, the wrongful inducement of Petitioners' deposits) are committed. See, e.g., Chiu v. Wong, 16 F.3d 306, 310 (8th Cir. 1994) (applying Minnesota law) ("The right to a constructive trust arose at the time of the wrongful conversion.") (citation omitted).[23] Thus, the court below distorted the law when it characterized Petitioners' constructive trust as "a retroactive legal fiction" and it ignored well-settled authority when it opined that a constructive trust "reaches back to snatch the [forfeited] property away from" the government. A-12. It ignored (or distorted) precedent and disregarded the pertinent statutory language to deny Petitioners the rights guaranteed to them under §1963(l)(6)(A) of RICO.

In its reliance on the "relation-back" doctrine, the District of Columbia Circuit also ignored this Court's recent decision in *92 Buena Vista Ave.*, which granted the protection of the "innocent owner" defense to the donees of forfeitable property and held that the government may no longer utilize the doctrine to deprive donees and post-illegal act transferees the opportunity to raise the innocent owner defense. 113 S. Ct. at 1135-36. This Court essentially held that the relation-back doctrine vests ownership of forfeitable property in the government *only* after the entry of a final order of forfeiture, rather than vesting title in the government at the moment of the illegal acts, *id.*, but the court below missed this critical

---

[23] *Accord Mitsubishi Int'l Corp. v. Cardinal Textile Sales*, 14 F.3d 1507, 1518 (11th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1092 (1995); *Hanson v. FDIC*, 13 F.3d 1247, 1253 (8th Cir. 1994); *United States v. Holzer*, 840 F.2d 1343, 1347 (7th Cir.), *cert. denied*, 486 U.S. 1035 (1988); *Capital Investors Co. v. Executors of Estate of Morrison*, 800 F.2d 424, 427 n.5 (4th Cir. 1986); *Levine*, 689 F. Supp. at 321-22; *In re General Coffee Corp.*, 64 B.R. 702, 707 (S.D. Fla. 1986), *aff'd*, 828 F.2d 699 (11th Cir. 1987), *cert. denied*, 485 U.S. 1007 (1988); *Fontana*, 528 F. Supp. at 146.

distinction in its wholesale (and wrongful) application of the relation-back doctrine to defeat Petitioners' claims.

The court below utilized the so-called "relation-back" doctrine to trump Petitioners' constructive trust claim, stating that when it enacted RICO, "Congress . . . devised a statutory remedial scheme that reaches *back to the time of the criminal acts* to forfeit the property to the United States." A-12 (emphasis in original). RICO provides that the government's title vests "upon the commission of the act giving rise to the forfeiture," 18 U.S.C. §1963(c), that is, when the RICO defendant commits the predicate acts of racketeering. *See* Comment, *RICO Forfeiture*, 37 UCLA L. Rev. at 1214; *United States v. One Parcel of Real Estate Property*, 660 F. Supp. 483, 487 (S.D. Miss.), *aff'd on other grounds*, 831 F.2d 566 (5th Cir. 1987); Note, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 Va. L. Rev. 165, 176 (1990) ("Note, *Tempering the Relation-Back Doctrine*"). In its haste to reject Petitioners' meritorious claims to BCCI's forfeited funds, however, the District of Columbia Circuit forgot that BCCI pled guilty in 1992 to predicate acts and resulting RICO violations arising out of its infiltration of U.S. banks, *not* its fraudulent inducement of Petitioners' deposits, which in many cases occurred years earlier. *See* A-3 to A-4.

In *In re Metmor Fin., Inc.*, 819 F.2d 446 (4th Cir. 1987), the Fourth Circuit held that because the lienholder's interest arose *before* the illegal activity, the title that vested in the government was already encumbered. Relying on this Court's decision in *United States v. Stowell*, 133 U.S. 1 (1890), where the plaintiff had obtained a mortgage interest in the property *before* any illegality occurred, *id.* at 19, and this Court held that "the mortgage is valid as against the United States," *id.* at 20, Judge Winter emphasized that "the government can succeed to no greater interest in the property than that which belonged to the wrongdoer whose actions have justified the seizure". *Metmor Fin.*, 819 F.2d at 448-49. *See also* Note, *Tempering the Relation-Back Doctrine*, 76 Va. L. Rev. at 177 (same).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted in this case.

DATED: May 1, 1995

KEVIN P. RODDY
MILBERG WEISS BERSHAD
HYNES & LERACH
355 South Grand Avenue
Suite 4170
Los Angeles, CA 90071
Telephone: 213/617-9007

Counsel of Record

WILLIAM S. LERACH
DENNIS STEWART
WILLIAM DATO
MILBERG WEISS BERSHAD
HYNES & LERACH
600 West Broadway
Suite 1800
San Diego, CA 92101
Telephone: 619/231-1058

PROFESSOR G. ROBERT BLAKEY
NOTRE DAME SCHOOL OF LAW
Notre Dame, IN 46556
Telephone: 219/631-5717

Attorneys for Petitioners

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 23, 1994 Decided February 14, 1995

No. 93-5296

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

V.

BCCI HOLDINGS (LUXEMBOURG), S.A., BANK OF CREDIT AND COMMERCE INTERNATIONAL, S.A., BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LIMITED, AND INTERNATIONAL CREDIT AND INVESTMENT COMPANY (OVERSEAS) LIMITED, DEFENDANTS-APPELLEES

SHRICHAND CHAWLA, LEO D. CURRAN, WILLY HERMANS, AND RED CIRCLE INVESTMENT, LTD., JALEH KHORASSANCHY, AMIT PANDYA, SOHA, INC., IDRISS DEVCO, INC., AND S&L GENTRADE, INC. CLAIMANT-APPELLANTS

No. 93-5299

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

V.

BCCI HOLDINGS (LUXEMBOURG), S.A., BANK OF CREDIT AND COMMERCE INTERNATIONAL, S.A. BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LIMITED, AND INTERNATIONAL CREDIT AND INVESTMENT COMPANY (OVERSEAS) LIMITED, DEFENDANTS-APPELLEES RAYMOND DAVIES, AS

CONSERVATOR FOR THE BRANCH IN SIERRA LEONE OF BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LIMITED, CLAIMANT-APPELLANT

Appeal from the United States District Court
for the District of Columbia
(91cv0655)

Before: SILBERMAN, HENDERSON, AND RANDOLPH, *Circuit Judges*

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge:* Appellants petitioned the district court to amend various court orders forfeiting assets of the Bank of Credit and Commerce International (BCCI) pursuant to the Racketeering and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1988 & Supp. V 1993). The petitions were dismissed. We affirm on the grounds that appellants' claims of entitlement to the funds in question are not cognizable under the forfeiture provisions of the RICO Act.

I.

In July, 1991, bank regulators in several countries jointly seized and shut down the operations of the four principal financial institutions that collectively made up the enterprise known as BCCI.[1] These measures,

---

[1] These four organizations were BCCI Holdings (Luxembourg), S.A., Bank of Credit and Commerce International

prompted by evidence of insolvency and extensive dealings in criminal affairs, were followed by the appointment of fiduciaries for BCCI by courts in Luxembourg and the Cayman Islands, the jurisdictions in which the principal entities were incorporated. A worldwide effort was then begun to consolidate all BCCI assets wherever located for a general global distribution to creditors and depositors.

BCCI's collapse prompted a flurry of civil and criminal investigations by various state and federal agencies in the United States, and criminal charges were brought against BCCI in several jurisdictions. Negotiations between law-enforcement officials and the court-appointed BCCI fiduciaries ultimately led to a comprehensive plea agreement filed with the federal district court in the District of Columbia. The agreement required BCCI to plead guilty to several state and federal criminal and civil charges, including RICO violations, and to forfeit to the Justice Department all BCCI assets located in the United States. It also provided, pursuant to the RICO statute, that half of all sums recovered by the government would be surrendered to the global liquidation fund; the other half was to be reserved for the Attorney General's discretionary allocation among several enumerated purposes, which included offsetting losses to "the Bank Insurance Fund of the FDIC and United States taxpayers" resulting

---

(Luxembourg), S.A., Bank of Credit and Commerce International (Overseas) Limited, and International Credit and Investment Company (Overseas) Limited. At the time of the shutdown, these BCCI companies had operations in 69 countries worldwide.

from BCCI's collapse and making further contributions to the global liquidation fund. The plea agreement, with its forfeiture provision, was approved by supervising courts in Luxembourg and the Cayman Islands.

The agreement was opposed, however, by various third parties with claims against BCCI, who saw that a total forfeiture of BCCI's U.S. assets would undermine their independent efforts at recovery. Dissatisfied with the prospect of a heavily discounted distribution from the global liquidation fund, these parties sought to block the plea agreement. In bankruptcy proceedings in New York, putative tort creditors unsuccessfully tried to have the district court in D.C. enjoined from accepting the agreement. *See In re Smouha*, 136 B.R. 921, 928 (S.D.N.Y.), *appeal dismissed*, 979 F.2d 847 (2d Cir. 1992). Still other parties contested the agreement directly before the district court. These claims too were rejected, however, and the district court formally accepted the plea agreement in January, 1992.

Shortly thereafter, the district court issued the first of three orders forfeiting all identified BCCI property located within the United States. The two later orders were issued in response to the discovery of additional assets. The forfeited amount – in aggregate approximately $552 million – largely came from bank accounts maintained at various U.S. banks in the names of specific overseas branches of BCCI. Following the district court's issuance of the three orders, numerous third parties, appellants among them, filed petitions claiming legal interests in the BCCI assets forfeited to the government.

Under the RICO Act, third parties are given an opportunity to challenge a forfeiture order if they can assert that they have a "legal interest in property which has been ordered forfeited." 18 U.S.C. § 1963(*l*)(2). A party who files a petition alleging a "legal interest" that, if established, would compel amendment of the forfeiture is then entitled to a hearing. *Id.* Section 1963(*l*)(6) sets forth the grounds upon which the court may grant relief.

> If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that –
>
> > (A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
> >
> > (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;
>
> the court shall amend the order of forfeiture in accordance with its determination.

18 U.S.C. § 1963(l)(6).

Two of the petitions at issue in this appeal were filed by persons claiming to represent a class of worldwide depositors in BCCI. These "class petitioners" had previously initiated a massive civil RICO action against the

founders, officers, and directors of BCCI as well as against numerous allegedly blameworthy "related" third parties. *See Hamid v. Price Waterhouse & Co.*, 15 RICO Law Rep. 1234, 1242-43, 1251 (C.D. Cal. 1992) (dismissing complaint on standing grounds). The class representatives' petitions merely asserted that the class members had an interest in the forfeited property. The nature and extent of that interest, they stated, could be found in an appended copy of the RICO complaint, 482 pages in length, filed in the *Hamid* case.

Raymond Davies, the other petitioner in this case, was appointed by a Sierra Leone court as conservator over BCCI's affairs in that country. As representative of the Sierra Leone branch depositors, Davies filed a petition challenging the forfeiture of $2 million held in the name of BCCI (Overseas) Sierra Leone at a New York bank. Davies alleged that the Sierra Leone deposits were entitled to a constructive trust over the funds because the alternative – pooling the Sierra Leone branch funds with those of the bank as a whole – would unjustly enrich BCCI; once recognized, such a trust would constitute a "superior" interest under § 1963(*l*)(6)(A). Alternatively, he argued that the depositors qualified as "bona fide purchasers" entitled to amendment of the order under § 1963(*l*)(6)(B).

The government moved to dismiss both parties' petitions on the ground that they had failed to state claims entitling them to relief under the statute. The class petitioners urged the district court to view their petitions as presenting the same legal theories Davies had advanced on behalf of the Sierra Leone depositors. The district

court somewhat skeptically granted this request and, further, assumed that a constructive trust could qualify as a "legal interest" under the RICO Act. *United States v. BCCI Holdings (Luxembourg), S.A.*, 833 F. Supp. 9, 13-14 (D.D.C. 1993). It nevertheless dismissed the class petitioners' claims. Their allegations, the court held, did not entitle them to the equitable remedy of a constructive trust; that relief would be fundamentally inequitable to the other depositors worldwide, who would not have the benefit of contributions from the forfeited assets to the global litigation fund. *Id.* The court also dismissed the class petitioners' alternative claim, based on their asserted status as general creditors, for failure to satisfy § 1963(*l*)(2)'s requirement that third parties claim an interest "in property" subject to forfeiture. *Id.* at 14-16. The Davies petition was dismissed on similar grounds in a separate ruling. *United States v. BCCI Holdings (Luxembourg), S.A.*, 833 F. Supp. 32, 39-40 (D.D.C. 1993). The appeals were consolidated.

II.

Appellants argue that the district court improperly ruled on the merits of their constructive trust allegations under § 1963(*l*)(6)(A) without granting them the benefit of an evidentiary hearing. They also assert that the district court incorrectly held that their alternative claims as general creditors could not satisfy the "bona fide purchaser" requirement of § 1963(*l*)(6)(B). The case turns, then, on whether the district court was correct in rejecting the petitions as a matter of law.

The government claims that the class petitioners are not even entitled to rely on the constructive trust theory on appeal because they did not properly raise it in their petitions below. The class petitioners made the constructive trust claim to the district court only at oral argument on the motions. For this reason, the district judge surely could have refused to permit the class petitioners – whose petitions were so sketchy and who did not even assert the constructive trust theory in their memorandum of law – to argue the issue at all. But she decided to "provide the claimants a generous benefit of the doubt and treat their petitions as if they alleged interests arising both from constructive trusts and from general debtor/creditor relationships." 833 F. Supp. at 13-14. Since Davies had properly presented the issue in his petition, it is not surprising that the district judge permitted the class petitioners, albeit grudgingly, to piggy-back on his theory, especially as the court ultimately rejected the claim. In any event, the government only asserts that the class petitions cannot support a constructive trust claim, not that the district court was in error in giving the class petitioners such wide latitude; since the government does not actually challenge the district judge's ruling, we do not understand why the government even raises the matter before us.

As to the district court's disposition of the constructive trust claim, the government asks that we affirm – but on different grounds. It argues that since a constructive trust is a creation of equity courts, *see, e.g., Healy v. Commissioner*, 345 U.S. 278, 282 (1953) ("A constructive

trust is a fiction imposed as an *equitable* device for achieving justice." (emphasis added) (citation omitted)), it cannot be recognized under § 1963(*l*)(6)(A) as a "*legal* right, title, or interest" (emphasis added). A party with any sort of equitable, as opposed to legal, claim – using the classic common law distinction – may only seek relief by appealing to the Attorney General, who may

> grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter. . . .

18 U.S.C. § 1963(g)(1). As recognized by the Second Circuit in *United States v. Schwimmer*, 968 F.2d 1570 (2d Cir. 1992), whether the statute recognizes equitable interests or only strictly "legal" ones is a close question. *See id.* at 1582 (a "legal interest" is an interest "in property or in claim cognizable at law in contrast to equitable interest" (quoting Black's Law Dictionary, 894 (6th ed. 1990)). The legislative history of the 1984 amendments that created the § 1963(*l*) proceedings suggests that Congress contemplated a distinction between traditionally "legal" and traditionally "equitable" interests. The Senate report indicated that § 1963(*l*) hearings were for parties claiming "a legal basis for relief" whereas the Attorney General's authority to grant relief under § 1963(g)(1) was the "appropriate ex[cl]usive remedy" for those asserting "merely equitable grounds." S. Rep. No. 225, 98th Cong., 2d Sess. 208, *reprinted in* 1984 U.S. Cong. Code & Admin.

News 3182, 3391. The government, then, has some support in urging us to limit the scope of "interest" under § 1963(*l*)(6)(A) to exclude equitable claims. But the congressional history is not dispositive. It is unclear whether the drafters intended to use to words "legal" and "equitable" in their technical senses or whether they were using the terms more as laymen do (and sometimes lawyers as well) with "legal" meaning "legally enforceable" or "recognized under law" and "equitable" implying "fair and just." *Compare* Black's Law Dictionary, 892 ("legal" defined as "according to law" or "proper or sufficient to be recognized by the law"); *id.* at 537 ("equitable" defined as "conformable to the principles of justice and right"). The Senate report apparently used the term "equitable" in its more expansive sense when referring to the Attorney General's authority to refashion forfeitures to protect innocent third parties, for § 1963(g)(1) allows the Attorney General to take any action "in the interest of justice." It would follow that the word "legal" was used in the legislative history – and, presumably, the statute – in its broader sense as well.

At the end of the day, we agree with our sister circuits that have rejected the notion that Congress intended to draw the ancient, but largely ignored, distinction between technically legal and technically equitable claims in forfeiture challenges. *See Schwimmer*, 968 F.2d at 1582; *United States v. Lavin*, 942 F.2d 177, 185 n.10 (3d Cir. 1991); *United States v. Campos*, 859 F.2d 1233, 1238-39 (6th Cir. 1988) (dicta). Prior to 1984, third parties claiming an interest in forfeited property could only petition the Attorney General for relief. Section 1963(*l*) was added to

alleviate due process concerns; obviously, only the property of the defendant (including property held by a third party pursuant to a voidable transaction) can be confiscated in a RICO proceeding. *See* S. Rep. No. 225, 98th Cong., 2d Sess. 208, *reprinted in* 1984 U.S. Cong. Code & Admin. News 3182, 3391. It seems to us that it would just as much offend notions of due process for the government to scoop up property in which a third party has certain kinds of equitable interests as it would for the government to take property in which a third party as a "legal" interest. Suppose, for instance, that a lawyer was a trustee who held assets in trust for the benefit of others, and that the lawyer, who was also part of a racketeering ring, used those assets in furtherance of criminal ends. We simply cannot imagine that Congress would have intended that the trust corpus by forfeited to the government without opportunity for challenge by the beneficiaries any more than it would property that the lawyer held as a bailee. Indeed, it seems to us that focusing on the distinction between equitable and legal interests obscures Congress' real intent. The key words in section 1963(*l*)(6)(A) to identify statutorily cognizable third party interests are "vested," "superior," and "at the time." To prevail under that provision, a third party must establish that his interest had vested or was superior to the defendant's interest *"at the time of the commission of the acts which gave rise to the forfeiture."*

It is because of that language in the section that we agree with the government that a constructive trust may not be used to defeat the government's forfeiture claim. Congress intended that as far as § 1963(*l*)(6)(A) is concerned, a third party's claim is to be measured not as it

might appear at the time of litigation, but rather as it existed at the time the illegal acts were committed. A constructive trust is a *remedy* that a court devises after litigation. It is, as we have noted, a fictional trust – not a real one. It could not have been shown to exist at the time the acts were committed. Moreover, Congress provided under § 1963(c) of the RICO forfeiture Act that title in all criminally acquired property of the defendant is deemed to "vest[] in the United States upon the commission of the act giving rise to forfeiture." Congress, in other words, devised a statutory remedial scheme that reaches *back to the time of the criminal acts* to forfeit the property to the United States. The statute thus creates a retroactive legal fiction similar to a constructive trust for the benefit of the United States. It is not open to a court to fashion another remedy (a competing fiction) that also reaches back to snatch the property away from the United States – which is exactly what a constructive trust would do.

We therefore disagree with those courts that have determined that a constructive trust can be interposed as superior to the government's forfeiture claim. *See Schwimmer*, 968 F.2d at 1582; *Lavin*, 942 F.2d at 187; *Campos*, 859 F.2d at 1238-39 (dicta); *United States v. Marx*, 844 F.2d 1303, 1307-08 (7th Cir. 1988). While those courts, in our view, properly rejected the government's legal/equitable distinction, they did not consider whether a judicially imposed constructive trust would be inconsistent with the statutory remedial scheme.

III.

Alternatively, appellants argue – in anther effort to gain a direct claim against the forfeited property – that even if, as mere depositors, they are only general creditors, they should be thought of as "bona fide purchasers" entitled to recover under § 1963(*l*)(6)(B). That section, it will be recalled, provides that a petitioner can establish a statutory "interest" by demonstrating that he

> is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

18 U.S.C. § 1963(*l*)(6)(B). Appellants' claim appears rather anomalous on its face, since bank depositors, as general creditors, have no interest in the specific accounts to which their deposits might be traced, only in the defendant's estate as a whole – and therefore can have no interest in particular assets forfeited, as required under both prongs of § 1963(*l*)(6), unless they have already secured a judgment against the debtor and perfected a lien against a particular item. *See Schwimmer*, 968 F.2d at 1581; *Campos*, 859 F.2d at 1240. Nevertheless, petitioners argue that since the amount of their claims (in the billions of dollars, we are told) exceeds BCCI's entire estate, their interest *necessarily* extends to any portion of the estate that has been forfeited to the government. They rely primarily on a Fourth Circuit opinion, *United States v. Reckmeyer*, 836 F.2d 200 (4th Cir. 1987), applying an identical statutory section that applies to drug trafficking crimes, 18 U.S.C. § 853(n) (1988). *Reckmeyer* accepted the theory that general creditors have an interest in forfeited

property if that property represents their only means of recovery and, further, that under such circumstances they should be regarded as "bona fide purchasers." *Reckmeyer*, 836 F.2d at 205, 207-08.

The government argues that both parts of *Reckmeyer*'s holding are incorrect and should not be followed. The Second Circuit, in *Schwimmer*, distinguished *Reckmeyer* on grounds that whereas the petitioners before it had asserted only an interest arising under 1963(*l*)(6)(A), which requires that a claimant have a "vested" interest in forfeited property or one "superior" to the defendant-debtor, *Reckmeyer* dealt with a "bona fide purchaser" claim under the provision of the drug crime for forfeiture statute parallel to § 1963(*l*)(6)(B) of the RICO Act. *See* 968 F.2d at 1481 & n.8. It is this latter provision upon which petitioners now rely.

We respectfully disagree with *Reckmeyer*. We think the government is correct that a general creditor can never have an interest in specific forfeited property, no matter what the relative size of his claim vis-a-vis the value of the defendant's post-forfeiture estate. Were it otherwise, the court litigating the forfeiture issue would be converted into a bankruptcy court and would not be able to grant forfeiture to the government until it determined that no general creditor would be unable to satisfy its claim against the defendant. That result appears patently at odds with the statutory scheme, which directs parties without an interest in specific property to seek relief from the Attorney General, not the court adjudging the forfeiture. The Attorney General has authority to

dispense confiscated funds "to protect the rights of innocent persons," 18 U.S.C. § 1963(g)(1), and general creditors seem precisely the type of innocent persons Congress had in mind.

Although a general creditor whose claim exceeds the value of the debtor's estate may in some sense have a legal interest against the entire estate, that is simply not the same as an interest in specific forfeited property – and contrary to *Reckmeyer*, under either prong of § 1963(*l*)(6), only the latter can defeat the government's claim. In addition to disregarding the statute's "in the property" requirement, *Reckmeyer* also relied upon an even more troublesome interpretation of the statute at the second stage of its analysis. The Fourth Circuit construed the term "bona fide purchasers for value" "liberally," as it put it, to include a general creditor. It reached this conclusion by reasoning that Congress could not have intended that "a car dealer who sold a car to a later convicted defendant without knowledge of the potential forfeitability of the defendant's assets could have the payment he received for the car forfeited while a person who purchased otherwise forfeitable stock from the defendant would be protected." *Reckmeyer*, 836 F.2d at 208. But we do not understand why the dealer's situation would be analogous to a general creditor's since, by hypothesis, he had already been paid. Nor do we see how, in the first case, the cash received by the dealer would be forfeited as the defendant's property (unless, perhaps, it had not been acquired in an arms-length transaction). Finally, the conclusion which the Fourth Circuit reached by its reasoning – that Congress wished to protect all those who engage in arms-length transaction

with the defendant – would mean that *all* innocent creditors would fall into the bona fide purchaser category. The difficulty with this position is that it is contrary to the natural meaning of what Congress said. Bona fide purchasers are not the same thing as general creditors.

* * *

In sum, we affirm the district court's dismissals of appellants' petitions on the grounds that they failed to state claims under the statute.

So Ordered.

UNITED STATES of America

v.

BCCI HOLDINGS (LUXEMBOURG), S.A., Bank of Credit and Commerce International, S.A., Bank of Credit and Commerce International (Overseas) Limited, and International Credit and Investment Company (Overseas) Limited, Defendants.

Cr. No. 91-0655 (JHG)

United States District Court,
District of Columbia.

Aug. 19, 1993.

ORDER DISMISSING THE MARCH 11, 1992 AND SEPTEMBER 11, 1992 PETITIONS OF SHRICHAND CHAWLA, LEO D. CURRAN, WILLY HERMANS AND RED CIRCLE INVESTMENT, LTD., JALEH KHORASSANCHY, AMIT PANDYA, SOHA, INC., IDRISS DEVCO, INC., AND S & L GENTRADE, INC.

JOYCE HENS GREEN, District Judge.

Presently pending are the United States' motions to dismiss the petitions for hearings to adjudicate interests in forfeited property filed by **Shrichand Chawla, Leo D. Curran, Willy Hermans and Red Circle Investment, Ltd., Jaleh Khorassanchy, Amit Pandya, Soha, Inc., Idriss Devco, Inc., and S & L Gentrade, Inc.** (the "petitioners" or "claimants"). Upon consideration of the motions to dismiss, all filings relating thereto, and oral argument presented at the May 14, 1993 hearing, the motions are granted and the petitions are dismissed.

BACKGROUND

On January 24, 1992, this Court, following findings of fact and conclusions of law with supporting reasons made in open court, accepted the pleas of guilty of the four corporate defendants (collectively "BCCI") and the plea agreement between them and the United States of America. Thereupon, and in accordance with 18 U.S.C. § 1963, an Order of Forfeiture was entered. Paragraph 1(e) of the Order provides that the corporate defendants named in this action shall forfeit to the United States ownership interests in all property located in the United States, including, without limitation, real property and all tangible and intangible personal property, however held, whether subsequently identified, determined or discovered in the course of the ongoing liquidation proceedings described therein or otherwise identified, determined, or discovered in any manner at any time, but not property that may be brought into the United States by or on behalf of court-appointed fiduciaries of BCCI in the course of the management or disbursement of the liquidation estates as described in the plea agreement. Attached to the January 24, 1992 Order as Exhibit A was a list of specific BCCI accounts, with corresponding numbers, names, and approximately balances, which the United States Marshals Service was directed to seize forthwith. Because the government was unable to verify certain information concerning additional forfeitable accounts at the time the Order of Forfeiture was entered, the Court issued a supplemental Order on January 31, 1992 which directed immediate seizure of the specific assets listed therein.

In satisfaction of 18 U.S.C. § 1963(*l*)(1), and to inform third parties of potential rights to seek recovery of assets declared forfeited, the United States published notice of Order of Forfeiture, as amended, during the period between February 13, 1992 and March 27, 1992 in eleven major United States newspapers including the *Wall Street Journal*, the *New York Times*, the *Chicago Tribune*, and the *Los Angeles Daily Journal See* Government's Compliance with Order of May 8, 1992, filed May 12, 1992. In addition, personal notice was sent to over 340 persons and entities as late as April 3, 1992. *Id.*

The claimants filed their first petition to amend the Order of Forfeiture on March 11, 1992. In that three page submission, they claimed to represent a class of over one million BCCI depositors in an action styled *Hamid v. Price Waterhouse & Co.*, Case No. CV-89-6538, which was then pending in the United States District Court for the Central District of California. Third Party Petition for Hearing to Adjudicate Property Interest (18 U.S.C. § 1963) ("Petition") at 1. The third amended complaint filed in the California case alleged that the plaintiffs lost billions of dollars due to racketeering and fraud committed by the 76 named defendants, including Price Waterhouse, Ernst & Young, Abu Dhabi, Clark Clifford, Robert Altman, and Manuel Noriega. To describe the interests which the claimants seek to recover in this case, the petition incorporated by reference the *Hamid* complaint and merely stated:

> The nature and extent of Petitioner's right, title, or interest in the subject property, which are superior to BCCI's claims at the time of the commission of the acts which gave rise to the

> guilty plea and forfeiture under 18 U.S.C. § 1963(1), the time and circumstances of Petitioner's acquisition of the right, title, or interest in the property, additional facts supporting the claims and the relief sought are alleged in detail in the attached Third Amended Complaint.

Petition at 2. Unfortunately, the third amended complaint, which exceeds 475 pages[1], sheds little light on the nature and extent of the legal interest asserted, especially since the defendants in this case were not parties to the *Hamid* litigation.

Because the California complaint was based on charges of racketeering and fraud, the government characterized the petitioners as tort claimants and addressed their claim in its Motion to Dismiss Petitions of BCCI Tort Petitioners, which also addressed claims filed by Banco Central de Reserva del Peru ("Peru"),[2] the Republic of Panama, and Lee Scarfone, Patricia Scarfone, ALSA International, Inc., and Banditball, Inc. ("the Scarfones").[3] The

---

[1] The petitioners represented that exhibits exceeding 2000 pages were attached to the complaint filed in the California action, Petition at 2-3, but those exhibits were not submitted to this Court.

[2] The Court dismissed Peru's petitions on February 22, 1993, holding that tort claimants could not be considered "bona fide purchasers for value" under 18 U.S.C. § 1963(*l*)(6)(B). *United States v. BCCI Holdings (Luxembourg), S.A.*, 814 F.Supp. 111 (D.D.C. 1993).

[3] The Court dismissed the Scarfones' petition on February 23, 1993, holding that as unsecured creditors, they could not assert the requisite interest in forfeited property. *United States v. BCCI Holdings (Luxembourg), S.A.*, 1993 WL 170640 (D.D.C.1993).

court-appointed fiduciaries for the four corporate defendants subsequently filed a memorandum of law addressing the same claims. The petitioners filed an opposition to the government's motion in which they argued that they should be considered depositors, rather than tort claimants, who were fraudulently induced to place money with BCCI. More specifically, the petitioners contended that because BCCI solicited deposits to be used for undisclosed legal purposes, the debtor/creditor contracts they entered were illegal and *void ab initio.* The depositors claimed that since they never passed title to their deposited funds to BCCI, those funds could not lawfully be forfeited to the United States. Memorandum on Behalf of Class Depositor/Petitioners' in Opposition to the Government's Motion to Dismiss Third Party Petitions for Hearing to Adjudicate Property Interest, filed June 22, 1992, at 12. The government filed a reply to the opposition, noting that the opposition constituted a "last minute attempt to rewrite their L-claims," Government's Reply to Oppositions to Motion to Dismiss Petitions of BCCI Tort Petitioners at 24, and citing reasons why the petitioners' new theory should be rejected.

On June 24, 1992, the government filed a Motion to Amend Order of Forfeiture to Include Additional Property, seeking forfeiture and seizure of assets in newly discovered bank accounts held in the names of the corporate defendants, proceeds from the sale of a condominium purchased with resources provided by a corporate defendant, money remaining in a "BCCI Legal Fund" established by one of the corporate defendants for the defense of its employees' legal interests, a bankruptcy distribution to one of the corporate defendants, and

assets held at various New York financial institutions in the name of ICIC Investments Ltd., a sibling corporation of defendant ICIC (Overseas) Ltd. The Court granted the government's motion and issued an Order of Forfeiture on July 29, 1992. The United States subsequently provided notice of the Order to potential claimants.[4]

The claimants filed their second petition on September 11, 1992, which was identical to the first except that it sought to recover funds forfeited in July 1992. The government filed a motion to dismiss the petitioners' "Round Two" claim, which also addressed second petitions filed by Peru and the Scarfones. The petitioners filed an opposition and the government submitted a reply. Oral argument on both motions was heard on May 14, 1993.

DISCUSSION

As an initial matter, the Court has serious doubts about the claimants' standing to file a petition on behalf of the more than one million BCCI depositors worldwide. Although the *Hamid* case was filed as a class action, no class was ever certified and the case has been dismissed by the District Court. In addition, no motion for class certification has been filed with this Court. Nonetheless, in light of the legal conclusions made below relating to the merits of the claims and because the time which putative class members could file individual petitions to amend the January 24, 1992 and July 29, 1992 Orders of Forfeiture has expired, the petitions will be treated, for

---

[4] Over 100 petitions to amend the two Orders of Forfeiture have been filed as of this date.

purposes of resolving the government's motions to dismiss, as having been filed by a class of worldwide depositors. In addition, no motion for class certification has been filed with this Court.

Title 18, United States Code, § 1963 sets forth an orderly procedure by which third parties seeking to recover interests in forfeited property may obtain judicial resolution of their claims. The provision granting standing to parties seeking to amend an order of forfeiture to exclude certain property states:

> Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice . . . , whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property.

18 U.S.C. § 1963(*l*)(2). Section 1963(*l*)(6) sets forth the substantive elements which a third party must establish to successfully obtain amendment of an order of forfeiture and provides in full:

> If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that –
>
> (A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or

> interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
>
> (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section; the court shall amend the order of forfeiture in accordance with its determination.[5]

Only by establishing standing and satisfaction of all exquisite elements of either § 1963(*l*)(6)(A) or (B) may a party obtain judicial relief from an order of forfeiture. *See United States v. Schwimmer*, 968 F.2D 1570, 1584 (2d Cir.1992) ("The *only* role of the District Court is to amend the order of forfeiture where a genuine property interest of the sort specified in § 1963(*l*)(6) is demonstrated.") (emphasis in the original); *United States v. Lavin*, 942 F.2d 177, 198 (3d Cir.1991) ("Those third parties who fall outside of the [limited avenues of relief], regardless of how sympathetic they are, must petition the Attorney General for relief.") If a third party fails to allege in its petition all elements necessary for recovery, including those relating to standing, the court may dismiss the petition without providing a hearing. *See United States v. Campos*, 859 F.2d

---

[5] Title 18 U.S.C. § 1963 (*l*)(6) contains exactly the same language as 21 U.S.C. § 853(n)(6), the statute providing for forfeiture in criminal narcotics cases, and it appears that no court has interpreted these two provisions differently. Because the two subsections are identical and because of the relative dearth of caselaw interpreting and applying § 1963 (*l*), the Court's opinion relies on reasoning contained in § 853(n) cases as well as in § 1963(*l*) cases.

1233, 1240 (6th Cir.1988); *United States v. Mageean*, 649 F.Supp. 820, 825 (D.Nev.1986), *aff'd without opinion*, 822 F.2d 62 (9th Cir.1987); S.Rep. No. 225, 98th Cong., 2d Sess., *reprinted in* 1984 U.S.Code Cong. & Admin.News 3182, 3374, 3391.

The litigation tactics of the petitioners and their chameleon-like characterizations of their claims have greatly frustrated the Court's attempts to understand the nature of the legal right, title, or interest in property which they seek to recover. The petitions' incorporation by reference of the third amended complaint in the *Hamid* case led the government, the court-appointed fiduciaries, and the Court to believe that the interests asserted arose out of alleged torts committed by BCCI or its agents. The petitioners' opposition to the government's motion to dismiss the first petition, however, indicates that the asserted interest is based on a theory that the petitioners were special depositors who never transferred title to their deposits to BCCI. Under that theory, it appeared that the petitioners claimed to be secured creditors of BCCI with ownership interests in traceable assets. When asked at the hearing, "What's the exact nature of the interest you are seeking in this case, the one before this Court? . . . [A]re you claiming the interest arising as depositors, as tort interests, contractual? What?," Transcript of May 14, 1993 Motion Hearing ("Tr.") at 16, counsel for the petitioners provided yet another characterization by responding, "We are general creditors. We acknowledge that. We do not call ourselves tort claimants. We are like the way the Court characterized the Scarfones' claims." Tr. at 17-18. Notwithstanding that clear representation, counsel asserted only minutes later that the petitioners' interest

arose from a constructive trust similar to the one imposed in *United States v. Schwimmer*, Tr. at 19. This theory was never raised by the Scarfones. When asked whether the claimants asserted interests arising out of a constructive trust in their petitions or in any other filings, counsel conceded, "No, because Your Honor, I was not aware of the point. I learned of it from reading the Bank of Japan's brief. I will say that in all candor." Tr. at 27. Though the Court has considered treating the terse petitions as if they asserted interests arising from tortious conduct and dismissing them summarily for the reasons supporting the dismissal of the petitions filed by Peru, *United States v. BCCI Holdings (Luxembourg), S.A.*, 814 F.Supp. 111 (D.D.C. 1993), it will provide the claimants a generous benefit of the doubt and treat their petitions as if they alleged interests arising both from constructive trusts and from general debtor/creditor relationships.

A. STANDING ISSUES ARISING UNDER 18 U.S.C. § 1963(*l*)(2)

Because 18 U.S.C. § 1963(*l*)(2) provides standing only to third parties asserting "*legal* interest[s] in property which has been ordered forfeited to the United States" (emphasis added), and because 18 U.S.C. § 1963(g) allows the Attorney General to restore forfeited property to victims when "in the interest of justice" and "non inconsistent" with other provisions of RICO, it might appear to some that constructive trusts, which are equitable remedies, cannot afford standing to third parties seeking to recover forfeited assets pursuant to § 1963(*l*). As the Second Circuit has recognized, however, the term "legal"

is ambiguous and "may be interpreted to mean, 'traditionally enforceable at law,' as opposed to 'traditionally enforceable at equity,' or it may mean, 'according to the law' as opposed to 'according to what is considered just and equitable.' " *Schwimmer*, 968 F.2d at 1582. While the Court concedes that the latter interpretation may not be as "obviously" correct as the Third Circuit found it to be, *Lavin*, 942 F.2 at 185 n. 10, it is nonetheless is persuaded by *Schwimmer* and the cases cited therein that "the term 'legal' in § 1963(*l*) should be interpreted to mean 'under the law,' " and that beneficiaries of constructive trusts can therefore have standing to seek judicial relief from an order of forfeiture. *Schwimmer*, 968 F.2d at 1582.

Notwithstanding the above conclusion relating to general notices of standing, it is inappropriate to impose a constructive trust in favor of the specific petitioners presently before the Court. As the record of this case clearly shows, one of the most significant motivating factors behind the Court's approval of the plea agreement between the United States and BCCI was the fact that the agreement provided for the creation of a worldwide victims fund so that "innocent victims of BCCI's wrongdoing can recover at least a portion of lost assets in as fair a manner as possible – equitable, orderly, and expeditious." Transcript of Plea Acceptance and Sentence, January 24, 1992, at 6. The Court expressly recognized, "Because the fund will be administered on a global scale through unified proceedings, piecemeal and unfair distribution can be avoided." *Id.* Assuming as true the petitioners' allegation that all deposits made by the purported class of claimants were fraudulently induced, there can be no doubt that imposition by this Court of a constructive trust

on those deposits would cause gargantuan disruption of the global liquidation proceedings currently underway. Besides the practical consideration of this Court's inability to adjudicate whether each of the approximately one million depositors can establish that they made deposits and that such deposits were forfeited by this Court, imposing a trust would significantly harm the abilities of other BCCI creditors to recover fair portions of lost funds. Therefore, in accordance with the rationales of *Sisters of the Presentation of the Blessed Virgin Mary of Aberdeen, South Dakota v. Nat'l Credit Union*, 961 F.2d 733 (8th Cir.1992); *Downriver Community Fed. Credit Union v. Penn Square Bank*, 879 F.2d 754 (10th Cir.1989), *cert. denied*, 493 U.S. 1070, 110 S.Ct. 1112, 107 L.Ed.2d 1019 (1990), and *Bruneau v Fed. Deposit Ins. Corp.*, 785 F.Supp. 585 (E.D.La.), *aff'd*, 981 F.2d 175 (5th Cir.1992), a constructive trust in favor of the petitioners will not be imposed.

Given that no constructive trust is recognized, petitions are considered, in accordance with their own prior description, to be "like the way the Court characterized the Scarfones' claims," Tr. at 18 – this is, simply as general creditors of BCCI. Unlike the beneficiary of a constructive trust, an unsecured or general creditor does not possess an interest in any specific asset of a debtor and merely has a general interest in the debtor's entire estate. *See* February 23, 1993 Order Dismissing the March 18, 1992 and September 4, 1992 Petitions of Lee Scarfone, Patricia Scarfone, ALSA International, Inc. and Banditball, Inc., *United States v. BCCI Holdings (Luxembourg), S.A.*, ___ F.Supp. ___ (D.D.C.1993); *Schwimmer*, 968 F.2d at 1581 ("A general creditor has no interest in a particular asset or particular funds that is either vested or superior to a

defendant's. He may have a right to receive payment, but he does not have a property interest superior to defendant's in any particular asset or funds. . . . "); *Campos*, 859 F.2d at 1240 (unsecured creditors who filed third-party claims "failed to allege or make a prima facie showing of any legal right, title, or interest in the *forfeited property*") (emphasis added); *United States v. Reckmeyer*, 836 F.2d 200, 206 & n. 3 (4th Cir.1987) ("Unlike secured creditors, general creditors cannot point to any one specific asset and claim that they are entitled to payment of the value of that specific asset. General creditors instead enjoy a legal interest in the entire estate of the debtor."); *Mageean*, 649 F.Supp. at 828 ("The Court . . . concedes the [unsecured] creditors do not, in a technical sense, have legal interests in the forfeited property."). Because general creditors are unable to assert interests in specific assets, they cannot assert legal rights, titles, or interests "in property which has been ordered forfeited" as required by § 1963(*l*)(2), at least in situations where a defendant's entire estate is not subject to forfeiture. *See Reckmeyer* at 206 n. 3 ("It is the dilemma of linking their interest to a specific asset rather than the problem of asserting a legal interest in the debtor's estate that frustrates general creditors who attempt to contest civil forfeitures."). Accordingly, given that the Court's Orders of Forfeiture reach only property located in the United States and not the entire estates of the four corporate defendants, the claimants do not have standing to seek amendment of the Court's Orders of Forfeiture and their petitions must be dismissed.

B. ISSUES RELATING TO THE SUBSTANTIVE REQUIREMENTS OF 18 U.S.C. § 1963(*l*)(6)(A) AND (B)

Even were the claimants found to have standing under § 1963(*l*)(2), they could not, as general unsecured creditors, be considered to have the "vested" or "superior" rights, titles, or interests in forfeited property which are required by § 1963(*l*)(6)(A). As recognized by the Second Circuit, "the categories of *vested* and *superior* are intended to cover those cases where the Court lacks jurisdiction over the property because it is not really 'property of the defendant.' " *Schwimmer*, 968 F.2d at 1581 (emphasis in the original). Because unsecured creditors lack property interests superior to a defendant's in particular assets or funds that warrants an amendment of an order of forfeiture under § 1963(*l*)(6)(A)." *Id.*[6]

In addition to failing to meet all requirements of § 1963(*l*)(6)(A), the claimants are unable to satisfy all prerequisites of the only other basis for court-ordered relief, § 1963(*l*)(6)(B). When defining the third parties who could recover under subsection (B), Congress used the phrase "bona fide purchaser for value," a legal term of art referring to certain buyers of tangible property. *See Lavin*, 942 F.2d at 185; *Campos*, 859 F.2d at 1238; *Mageean*, 649 F.Supp. at 829. Though some courts applying § 1963(*l*)(6)(B) or its equivalent in the Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C.

---

[6] Had a constructive trust been imposed in favor of the petitioners, it appears that they might be able to recover under § 1963(*l*)(6)(A), but only if they could trace their interests to specific funds before the Court. *See Schwimmer*, 968 F.2d at 1583.

§ 853(n)(6)(B), have interpreted the phrase to include any person engaging in an arms' length business transaction, *see, e.g., Reckmeyer*, 836 F.2d at 208; *Mageean*, 649 F.Supp. at 829, such a broad interpretation of the phrase is inappropriate. As Justice O'Connor has noted, "a judge must presume that Congress chose its words with as much care as the judge [herself] brings to bear on the task of statutory interpretation," *FBI v. Abramson*, 456 U.S. 615, 635, 102 S.Ct. 2054, 2066, 72 L.Ed.2d 376 (1982) (dissenting opinion), and the literal language of a statute should be conclusive in the absence of a clearly expressed legislative intent to the contrary. *See Russello v. United States*, 464 U.S. 16, 20, 104 S.Ct. 296, 299, 78 L.Ed.2d 17 (1983). *See also Evans v. United States*, ___ U.S. ___, ___, 112 S.Ct. 1882, 1885, 119 L.Ed.2d 57 (1992) ("It is a familiar 'maxim that a statutory term is generally presumed to have its common-law meaning.' ") (quoting *Taylor v. United States*, 495 U.S. 575, 592, 110 S.Ct. 2143, 2155, 109 L.Ed.2d 607 (1990)). Congress could easily have adopted language in § 1963(*l*)(6)(B) expressly providing protection to all parties engaged in arms' length transactions with defendants, and its failure to do so is strong evidence of a desire not to provide such a wide avenue of relief. The Senate Judiciary Committee's report on the statute does not provide persuasive evidence of a clear intent to the contrary. It is true that the report recognized that the purpose of the relation back doctrine codified at § 1963(c) was to "close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not *'arms' length.'* " S.Rep. No. 225, 98th Cong., 2d Sess. 200-01, *reprinted in* 1984 U.S.Code Cong. & Admin.News 3383-3384 ("S. Rep.") (emphasis

added). However, when the report addressed the nature of relief available to third parties under § 1963(*l*)(6), the provision at issue here, it used narrower language and spoke only of vested or superior interest holders and "bona fide *purchasers* for value." S.Rep. at 209, 1984 U.S.Code Cong. & Admin.News at 3392 (emphasis added). Accordingly, in light of the clear statutory language and the absence of an unambiguously expressed contrary intent of Congress, the phrase "bona fide purchaser for value" is interpreted to refer only to a certain class of buyers of tangible property. Because the claimants did not obtain their alleged interests through the purchase of tangible property, they would not be entitled to relief under § 1963(*l*)(6)(B) even were they found to have standing under § 1963(*l*)(2).[7]

C. THE PETITIONERS' REQUEST FOR A STAY

At the close of the hearing on the government's motions to dismiss, the petitioners asked for a stay prohibiting the disbursement of forfeited funds in the event the motions are granted. In a written filing submitted after the hearing and in accordance with a briefing schedule set by the Court, the government opposed the request, primarily on the grounds that a stay is premature

---

[7] This Court's Order Dismissing the April 24, 1992 and September 2, 1992 Petitions of Banco Central de Reserva del Peru, 814 F.Supp. 111 (D.D.C. 1993), does not conflict with the above analysis. Because Banco Central de Reserva del Peru, as a tort claimant, could not be considered to have obtained its asserted interest even through an arms' length transaction, it was unnecessary to further define the scope of "bona fide purchase for value" in that opinion.

and unnecessary since no forfeited assets may be disbursed until the Court approves a formal motion for disbursement and until claims to forfeited assets have been "resolved." *See* Paragraph 7 of January 24, 1993 Order of Forfeiture.[8] The court-appointed fiduciaries for the corporate defendants agree that the denial of a stay would not result in any immediate disbursement of funds. In light of the procedures set forth in Paragraph 7 and the government's concession that third-party petitions may submit oppositions to disbursement motions based, *inter alia*, on the pendency of an appeal, *see* Government's Brief Relating to Stay Pending Appeal of order Dismissing L-Claim, filed June 2, 1993, at 3-5, the claimants' request for a stay is denied without prejudice. The petitioners' request for a stay may be renewed in the form of an opposition to a motion for disbursement.

CONCLUSION

For the reasons stated above, it is hereby

ORDERED that the March 11, 1992 and September 11, 1992 petitions filed by **Shrichand Chawla, Leo D. Curran, Willy Hermans and Red Circle Investment, Ltd., Jaleh**

---

[8] Paragraph 7 provides in full:

> Pursuant to the ancillary hearing procedures set forth in Title 18, United States Code, Section 1963(*l*), no disbursements shall be made from the Account without further Order of this Court. Should it appear that no claim has been made with respect to particular assets transferred to the Account pursuant to Section 1963(*l*), or at such time as such claims to such assets have been resolved, the Court will entertain motions from the government for the disbursement of funds.

Khorassanchy, Amit Pandya, Soha, Inc., Idriss Devco, Inc., and S & L Gentrade, Inc. are dismissed. It is

FURTHER ORDERED that the petitioners' request for a stay pending appeal is denied without prejudice to renew in the form of an opposition to a motion for disbursement filed by the government. The government shall serve a copy of its motion for disbursement on counsel for the petitioners when such a motion is filed.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

In re BANK OF CREDIT AND COMMERCE INTERNATIONAL DEPOSITORS LITIGATION	No. MDL-908 No. CV 91-4483 CBM (Ex)
AKHTAR HAMID, et al., Plaintiffs, v. PRICE WATERHOUSE & CO., et al., Defendants.	ORDER VACATING MEMORANDUM OPINION; AMENDED MEMORANDUM OPINION

Upon review of the Court's Memorandum Opinion, the Court has discovered the following clerical errors:

1. On page 4, line 17 "million" should read "billion."

2. On page 19, line 4 "million" should read "billion."

In order to correct these clerical errors, the Court hereby vacates its Memorandum Opinion pursuant to Federal Rule of Civil Procedure 60(a) and issues the following Amended Memorandum Opinion.

AMENDED MEMORANDUM OPINION

These matters came on regularly for hearing on March 20, 1992 before the Court, the Honorable Consuelo B. Marshall, District Judge presiding, on plaintiffs'

motion to add additional parties, brought pursuant to Rules 15 and 21 of the Federal Rules of Civil Procedure, and defendants' motions to dismiss plaintiffs' third amended complaint (the "Complaint"), brought pursuant to Rules 9(b), 12(b)(1), and 12(b)(6) of the Federal Rules of Civil Procedure.[1] Also pending resolution are issues raised in defendant PW/UK's motion which the Court took under submission on January 15, 1992 (*i.e.*, whether

---

[1] These include: (a) the motion of defendants Bank of America NT&SA and BankAmerica Corporation (collectively "BofA") to dismiss; (b) the motion of defendant Price Waterhouse U.K. ("PW/UK") to dismiss; (c) the motion of defendant Price Waterhouse U.S. ("PW/US") to dismiss; (d) the motion of defendant Price Waterhouse World Firm Ltd. to dismiss and to strike; (e) the motion of defendants Clark Clifford, Robert Altman, and the law firm of Clifford & Warnke (collectively the "Clifford Defendants") to dismiss; (f) the motion of defendants InterRedec, Inc., InterRedec Inc., Wesley Co., Inc., River Oaks, Inc., River Oaks Investments, Inc., Sterling Bluff, Inc., Concorde Finance & Investments, and GRP Investments N.V. (collectively the "InterRedec Defendants") to dismiss: (g) the motion of defendants First American Corporation, First American Bankshares, Inc., Jack W. Beddow, Paul G. Adams, III, and A. Vincent Scoffone (collectively the "First American Defendants") to dismiss; (h) the motion of defendant Ernst & Young U.S. ("E&Y") to dismiss; (i) the motion of defendant Fulvio Dobrich to dismiss; (h) the motion of defendant Abu Dhabi Investment Authority (ADIA") to dismiss; and (k) the motion of defendant Hill & Knowlton, Inc. ("H&K") to dismiss. Additionally, putative defendants Paul C. Warnke, John F. Kovin, David I. Granger, Harold D. Murry, Jr., JOhn G. Calendar, J. Griffin Lesher, Bryan Jay Yolles, Robert P. Reznick, Philip H. Hecht, and James C. Duff, all partners in Clifford & Warnke, have filed a motion to dismiss. However, plaintiffs added these individuals to the Complaint without first seeking leave of the Court to amend. Thus, neither these individuals, nor the motion they have filed, are presently before the Court.

to dismiss for lack of subject matter jurisdiction, on forum non conveniens grounds, or to abstain). Having considered the papers filed in connection with the motions and the arguments of counsel at hearing, the Court issues the following memorandum opinion.

I. STATEMENT OF FACTS

On July 5, 1991, banking regulators in the United Kingdom, Luxembourg, and the Cayman Islands seized the operations of the Bank of Credit and Commerce International.[2] At the time it was closed, BCCI operated 400 branches in over 70 countries and was the fifth largest private bank in the world. BCCI, S.A. will not reopen and is "hopelessly insolvent"; depositors' funds are frozen and unavailable. Potential claims against BCCI exceed its remaining assets, but the cooperative effort of liquidators in the United Kingdom, Luxembourg, and the Cayman Islands has resulted in a proposed settlement with BCCI's majority shareholders, Sheikh Zayed and the government of Abu Dhabi. The settlement contemplates a cash payment by Abu Dhabi of $ 2.2 billion, which would result in a distribution to depositors of between 25 and 40 percent of the deposits they lost.[3]

---

[2] Related entities include Bank of Credit and Commerce International, S.A., Bank of Credit and Commerce International (Overseas) Ltd., Bank of Credit and Commerce International Holdings (Luxembourg) S.A., International Credit and Investment Company (Overseas) Ltd., International Credit and Investment Company Holdings, and Credit and Commerce American Holdings, N.V. and its subsidiary Credit and Commerce American Investment, B.V. (collectively "BCCI").

[3] Many additional factors will affect depositors' ultimate recovery. For example, liquidators are presently pursuing

In the United States, BCCI operated agency offices at one time in Los Angeles, San Francisco, and Beverly Hills, California; Boca Raton, Miami, and Tampa, Florida; Houston, Texas; Chicago, Illinois; New York City, New York; and Washington, D.C. At the time BCCI was closed by regulators, only the Los Angeles and New York offices were operating. Plaintiffs allege that BCCI solicited and obtained deposits in the United States through these agency offices. *See* Complaint, ¶¶ 33, 289(g). Presently, the Superintendents of Banking of New York and California have seized BCCI assets and are proceeding to settle depositor claims. BCCI assets being marshalled in the United States far exceed potential claims and only the excess will be turned over to the foreign BCCI liquidators. As a result, no BCCI depositors who had money in United States offices on July 5, 1991 will lose their deposits.[4]

Plaintiffs purport to represent approximately 1 million BCCI depositors worldwide who have lost $ 6 billion as a result of the financial collapse and regulatory seizure of BCCI. Named plaintiffs consist of United States citizens (Hamid, Curran, Khorassanchy, and Chawla);[5]

---

additional claims on behalf of BCCI, including claims filed against both E&Y and various Price Waterhouse entities.

[4] Plaintiffs have not argued otherwise. They contend, however, that United States depositors presently suffer the loss of the use of their money, have suffered that loss since July 5, 1991, and will not recover interest on their deposits for this time.

[5] Additionally, United States Citizens Philip Merz and Amit Pandya seek to be added to this action as plaintiffs.

United States corporations (Soha, Inc. and Idriss Devco, Inc.); foreign corporations (S&L Gentrade, Inc. and Red Circle Investments, Ltd.); and foreign residents (Musleh, Hermans, Hasim, and Murbarek). Plaintiffs have named seventy-seven defendants on the basis of their various relationships to BCCI.[6] BCCI itself is not a defendant here because of international liquidation proceedings and a resulting bankruptcy stay entered in the United States. *See In re Petition of Brian Smouha*, No. 91-B-13569 (S.D.N.Y. Bankr.).

Plaintiffs' initial complaint alleged four claims for relief: Counts One through Three were brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. sections 1962(a)/(d),[7] (c)/(d),[8] &

---

[6] Plaintiffs characterize defendants as either (1) BCCI strawmen/frontmen or looters; (2) BCCI owners or founders; (3) BCCI officers or agents; (4) United States assistors or co-conspirators; (5) other United States instrumentalities; and (6) professional service providers to BCCI (*i.e.*, accountants, lawyers, and public relations firm). *See* Complaint, chart following page 47.

[7] Subjection (a) of 18 U.S.C. § 1962 provides:
It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise. . . .

[8] Subsection (c) of 18 U.S.C. § 1962(c) provides:
It shall be unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . .

(b)/(d);[9] Count Four alleged a claim under the Alien Tort Statute, 28 U.S.C. § 1350.[10] On January 15, 1992, the Court issued its Order Re Dismissal and a More Definite Statement (the "Order"), in which the Court dismissed Count Four without leave to amend, but gave plaintiffs leave to amend the RICO claims contained in their 212-page second amended complaint.[11] In response to the Court's Order, plaintiffs filed their 482-page Complaint on January 20, 1992, attaching (and, in many cases, incorporating by reference) 2003 additional pages of exhibits.

The facts alleged in plaintiffs' Complaint fall into three categories: (1) BCCI's involvement in various criminal activities; (2) regulatory violations stemming from BCCI's secret ownership and control of several United

---

[9] Subsection (b) of § 1962 provides:

> It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise. . . .

[10] Section 1350 provides a remedy in federal court for "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." By its terms, the Alien Tort Statute only imposes liability for violation of a treaty or the law of nations. *See Filartiga v Pena-Irala*, 630 F.2d 876, 887-88 (2d Cir. 1980).

[11] Part of the Order was adapted from a RICO Standing Order or Case Statement issued by Judge Krenzler in *Lyman Steel Co. v. Shearson Lehman Bros., Inc.*, No. C 86-355 (N.D. Ohio Feb. 13, 1986). A similar RICO Case Statement must now accompany all RICO filings in the Southern District of California. *See* General Order No. 386, 92 Daily Journal D.A.R. 883 (Jan. 22, 1992).

States financial institutions;[12] and (3) the worldwide fraud perpetrated upon depositors, which ultimately ended in the financial collapse of BCCI. In response to the Court's Order,[13] plaintiffs allege that the defendants' violations of RICO caused them to lose their deposits as follows:

> (a) depositors were defrauded into placing their deposits into a criminal enterprise instead of a legitimate bank because BCCI falsely represented that it had substantial assets, profitability, a lawful operation and would be able to honor depositors' claims;
>
> (b) the ongoing existence of BCCI's criminal enterprise would not have been possible had the defendants not helped BCCI continue to operate;[14]

---

[12] BCCI's financing of "fronts" or strawmen – wealthy businessmen and rulers of middle eastern states – permitted BCCI to surreptitiously acquire and control defendant First American Bank (400 branches in six states, based in Washington, D.C.); the National Bank of Georgia (the largest bank in Georgia); CenTrust Savings (20 branches in Florida); Independence Bank (11 branches, based in Encino, California; now insolvent and voluntarily dismissed by plaintiffs as a defendant in this case), and Viking Savings & Loan (Santa Monica, California).

[13] The Court ordered plaintiffs, by appending paragraphs 342, 350 and 358 of the Complaint, to "describe the causal relationship between plaintiffs' alleged injury and *each* defendants' violation of [RICO]." *See* Order, ¶¶ 10(L), (M), and (N) (emphasis in original).

[14] The alleged assistance provided by the defendants includes the defendants' failure to publicly disclose BCCI's true nature and their assistance helping BCCI avoid detection by regulators.

(c) as a continuing operation, BCCI continued to accept plaintiffs' deposits; and

(d) because of defendants' racketeering acts (which constituted the operation of BCCI), banking regulators seized BCCI on July 5, 1991, freezing depositors' funds and causing their present losses.

See Complaint, ¶¶ 342, 350, 358.

II. ANALYSIS

A. SUFFICIENCY OF PLAINTIFFS' ALLEGATIONS

On a motion to dismiss for failure to state a claim upon which relief can be granted brought pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the complaint must be construed in the light most favorable to the non-moving party and all of the allegations contained in the complaint are taken as true. *Jenkins v. McKeithen*, 395 U.S. 411, 421-22, 89 S. Ct. 1843, 23 L.Ed.2d 404, *reh'g denied*, 396 U.S. 869, 90 S. Ct. 35, 24 L.Ed.2d 123 (1969)[15] A Rule 12(b)(6) motion to dismiss should be granted only if "it appears beyond a reasonable doubt that the plaintiff can prove no set of facts which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957).

---

[15] However, the Court does not "necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.), *cert. denied*, 454 U.S. 1031, 102 S. Ct. 567, 70 L.Ed.2d 474 (1981).

Despite these liberal pleading standards, certain types of pleadings require more particularity. Rule 9(b) of the Federal Rules of Civil Procedure provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Allegations of fraud require the pleader to detail with particularity the time, place, and manner of each act of fraud, plus the role of each defendant in each fraudulent scheme. *Lancaster Community Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 405 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1168, 117 L.Ed.2d 414 (1992); *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393 (9th Cir. 1986).

Rule 9(b) ensures that allegations of fraud are specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong. *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985).[16] "[P]leading is sufficient under Rule 9(b) if it identifies 'the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations.' " *Id.* at 735 (citation omitted). When the alleged conduct upon which a RICO claim are fraud-type predicate offenses, Rule

---

[16] Rule 9(b) serves three purposes: (1) providing a defendant fair notice of the plaintiff's claim, thus enabling the defendant to prepare a defense; (2) protecting a defendant from harm to his reputation or goodwill; and (3) reducing the number of strike suits. *Di Vittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2d. Cir. 1987) (citing *Reingold v. Deloitte Haskins & Sells*, 599 F. Supp. 1241, 1266 (S.D.N.Y. 1984) (Rule 9(b) "inhibits the filing of a complaint as a pretext for discovery of unknown wrongs.").

9(b)'s requirement of pleading particularity applies to those allegations. *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 541 (9th Cir. 1989).

Most of the moving defendants continue to protest what they consider a dearth of allegations specifying their role in the alleged wrongdoing.[17] However, the Court is satisfied that plaintiffs' Complaint alleges with sufficient particularity the basis for each defendants' inclusion in plaintiffs' suit. Indeed, many of plaintiffs' allegations clearly and painstakingly detail defendants' involvement with BCCI.

Additionally, plaintiffs' prior use of inherently ambiguous names such as "Price Waterhouse" and "Ernst & Young" in previous pleadings is not repeated in the Complaint. Plaintiffs have complied with the Court's Order to "distinguish between the separate firms of each organization. . . . " *See* Order, ¶ 10(B).[18] In addition to

---

[17] For example, the public relations firm H&K complains that it is only alleged to have distributed a "fact sheet" in response to a magazine article about BCCI. *See* Complaint, ¶¶ 36, 334. Defendant Dobrich notes that he is only alleged to have been hired as an executive of Independence Bank in mid-1989, although plaintiffs' conspiracy allegations span sixteen years. *See* Complaint, Ex. 23. E&Y objects to its inclusion in charged misconduct that occurred over unspecified or broad spans of time, particularly since E&Y resigned as BCCI's auditor in 1987 and none of the alleged losses occurred until 1991.

[18] Though the defendant accounting firms contend that plaintiffs have merely substituted "PW/UK, PW/US and PW/Luxembourg" for each previous instance of "Price Waterhouse" and "EY/US, EY/UK, and EY/Luxembourg" for each previous instance of Ernst & Young," not all allegations contain all three entities. Plaintiffs have made some distinctions between the entities in the Complaint.

making distinctions between the accounting firm entities, plaintiffs also sufficiently allege an agency relationship between the different entities and are entitled to proceed on that basis as well.

The Court further concludes that plaintiffs adequately allege both conspiracy and aiding and abetting liability. Consequently, these allegations bar the independent evaluation of each defendants' isolated role in BCCI's collapse urged by the defendants because the Court cannot dismiss defendants who are sufficiently alleged to have been co-conspirators with those defendants whose predicate acts caused plaintiffs' injuries. *See Beltz Travel Serv., Inc. v. International Air Transport Ass'n*, 620 F.2d 1360, 1367 (9th Cir. 1980) (all conspirators are liable for the acts of their co-conspirators).

B. PLAINTIFFS' RICO CLAIMS

1. Plaintiffs' Alleged RICO Enterprises

Plaintiffs clearly state that their alleged RICO enterprises are both identical to the pattern of racketeering activity. *See* Complaint, ¶¶ 339 (BCCI enterprise and pattern, as well as associated-in-fact enterprise and pattern, are "one in the same"), 340(b) ("BCCI enterprise and association-in-fact enterprise are both "synonymous with the pattern of illegal racketeering"), 347, 348(b), 355, & 356(b). Plaintiffs' failure to allege an ascertainable structure to the RICO enterprises – separate and apart from the pattern of racketeering activity – is fatal to the allegations of these enterprises. As the Ninth Circuit noted in *United Energy Owners Comm., Inc. v. United States Energy*

Management Sys., Inc., 837 F.2d 356, 362 n.13 (9th Cir. 1988),

> [t]he *Allington* [*v. Carpenter*, 619 F. Supp. 474 (C.D. Cal. 1985)] court correctly noted that under [*United States v.*] *Turkette* [452 U.S. 576, 101 S. Ct. 2524, 69 L.Ed.2d 246 (1981),] every private plaintiff asserting a violation of RICO section 1962(c) must "plead an enterprise apart from the underlying pattern of racketeering activity." 619 F. Supp. at 469 (citing *United States v. Bledsoe*, 674 F.2d 647, 665 (8th Cir.) (RICO enterprise must have "an 'ascertainable structure' distinct from that inherent in the conduct of a pattern of racketeering activity."), *cert. denied*, 459 U.S. 1040, 103 S. Ct. 456, 74 L.Ed.2d 608 (1982)).

See also Sigmond v. Brown, 645 F. Supp. 243, 246 (C.D. Cal. 1986), *aff'd*, 828 F.2d 8 (9th Cir. 1987) (no separate enterprise where plaintiff had stated that the sole purpose of the enterprise was to conduct the alleged racketeering activity). Thus, plaintiffs' RICO claims fail to state a claim because the alleged enterprises have no ascertainable structure distinct from the alleged pattern of racketeering activity.[19]

---

[19] The Court's dismissal of substantive RICO claims constitutes a dismissal of the conspiracy alleged under section 1963(d) as well. *See Condict v. Condict*, 826 F.2d 923, 927 (10th Cir. 1987) ("any claim under section 1962(d) based on a conspiracy to violate the provisions of 18 U.S.C. section 1962(a), (b), or (c) must necessarily fail if the substantive claims are themselves deficient").

2. Plaintiffs' "Reinvestment Injury" Claim Under Section 1962(a)

Plaintiffs section 1962(a) RICO claim is based solely on the use or investment, more accurately characterized as "reinvestment," of racketeering income by defendants in their own continuing operations. *See* Complaint, ¶ 341(f).[20] The causal nexus to plaintiffs' injury alleged by plaintiffs is that the reinvestment of racketeering income in each defendants' own operations permitted each defendant to continue to exist and engage in the illegal conduct which permitted BCCI to continue to operate without detection and solicit deposits from plaintiffs. Plaintiffs rely upon *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393 (9th Cir. 1986), to argue that each defendants' reinvestment of racketeering income in its own operation states a claim under section 1962(a). *See id.* at 1398 ("Logic dictates that a corporation, receiving income from a pattern of racketeering in which it has participated as a principal, can invest that income in its own operations.") (citing *Pennsylvania v. Derry Constr. Co.*, 617 F. Supp. 940, 943 (W.D. Pa. 1985)). The *Schreiber* court expressly held that "where a corporation engages in racketeering activities and is the direct or indirect beneficiary of the pattern of racketeering activity, it can be both the 'person' and the 'enterprise' under section 1962(a)." *Id.*

---

[20] The Court's Order required plaintiffs to amend paragraph 341 of the pleading and "(i) [s]tate specifically who received income derived from the pattern of racketeering activity; (ii) [d]escribe the use or investment of such income and the enterprise in which it was used or invested; and (iii) [s]tate specifically how the victims were injured by reason of the use or investment of racketeering income." Order, ¶ 10(H).

However, a question not considered by *Schreiber* is whether reinvestment can cause plaintiffs' injury in a section 1962(a) claim. Section 1964(c) of RICO provides a private right of action to persons injured "by reason of a violation of section 1962." In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S. Ct. 3275, 3285-86, 87 L.Ed.2d 346 (1985), the Supreme Court held that a plaintiff has standing to bring a RICO claim under section 1962(c) only to the extent that the conduct constituting the RICO violation caused injury to his business or property. Thus, under section 1962(c), an allegation of a pattern of racketeering activity which causes injury to plaintiff sufficiently states a cause of action.

By contrast, the gravamen of the offense under Section 1962(a) is not the underlying racketeering activity itself, but the subsequent use and investment of proceeds obtained through the racketeering activity. Thus, to state a claim under section 1964(c) for a violation of section 1962(a), plaintiffs must allege injury by the use or investment of the proceeds of racketeering activity. *See, e.g., Ouaknine v. MacFarlane*, 897 F.2d 75, 82 (2d Cir. 1990); *Rose v. Bartle*, 871 F.2d 331, 357-58 (3d Cir. 1989); *Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147, 1149 (10th Cir.), *cert. denied*, 493 U.S. 820, 110 S. Ct. 76, 107 L.Ed.2d 43 (1989); *U.S. Concord, Inc. v. Harris Graphics Corp.*, 757 F. Supp. 1053, 1060 (N.D. Cal. 1991); *In re U.S. Grant Hotel Assoc. Ltd. Sec. Litig.*, 740 F. Supp. 1460, 1469 (S.D. Cal. 1990). *Contra In re National Mortgage Equity Corp. Mortgage Pool Certificates Sec. Litig.*, 682 F. Supp. 1073 (C.D. Cal. 1987) ("*NMEC*").[21]

---

[21] The Ninth Circuit declined to reach this issue in *Reddy v. Litton Indus., Inc.*, 912 F.2d 291 (9th Cir. 1990), *cert. denied*, 112 S.

Plaintiffs assert that defendants' reinvestment in their own operations perpetuated the RICO enterprise and permitted the racketeering activity to continue. *See* Complaint ¶ 341(f). This reinvestment injury theory is simply another way of stating that the predicate acts caused plaintiffs' injury and does not state an injury separately stemming from the reinvestment sufficient to state a claim under section 1962(a). *See U.S. Concord, Inc.*, 757 F. Supp. at 1060; *Williamson v. Simon & Schuster*, 735 F. Supp. 565, 568-68 (S.D.N.Y. 1990). For these reasons, plaintiffs' section 1962(a) claim is dismissed without leave to amend.[22]

Ct. 332, 116 L.Ed.2d 272 (1991), but recognized that three of four circuit courts and a majority of district courts have required section 1962(a) plaintiffs to show injury from the use or investment of racketeering income rather than from the predicate acts alone. *Id.* at 295-96. The court also noted that Judge Tashima acknowledged the split of opinion on the issue and that his opinion in *NMEC*, 682 F. Supp. at 1073, was issued without the benefit of the appellate decisions in the Second, Third, and Tenth Circuits. *Reddy*, 912 F.2d at 296 n.6.

[22] In response to defendants' objections that they had not invested in BCCI, the Court previously observed that the complaint sufficiently alleged the use or investment of income in an enterprise under § 1962(a), "at least to the extent the enterprise is defined as the associated-in-fact enterprise consisting of the BCCI Banks and the defendants listed in the complaint." Order, ¶ 3. The Court did not thereby determine that this claim was legally sufficient in all respects; the present challenge to the legal sufficiency of the claim was not before the Court.

C. ARE PLAINTIFFS' CLAIMS DERIVATIVE OR DIRECT?

Defendants contend that plaintiffs lack standing because their claims are derivative of BCCI rather than direct.[23] Plaintiffs do not contest the legal principles cited by defendants; rather, plaintiffs merely insist that their claims are direct. However, plaintiffs' RICO claims are derivative of BCCI and plaintiffs lack standing to prosecute them. *See, e.g., Adato v. Kagan*, 599 F.2d 1111, 1117 (2d Cir. 1979) (citing 1 Michie, *Banks and Banking* § 69 at 289-91 (1973), for the general rule that "wrongdoing by bank officers that adversely affects all depositors creates a liability which is an asset of the bank and only the bank or its receiver may sue for its recovery."); *Sax v. World Wide Press, Inc.*, 809 F.2d 610, 613 (9th Cir. 1987) (citing 12B W. Fletcher, *Cyclopedia of the Law of Private Corporations*, § 5911 (rev. perm. ed. 1984), for the general rule that "an action enforces a corporate right 'if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock or property without any severance or distribution among individual holders.' ");[24] *In re Sunrise Sec. Litig.*, 916 F.2d 874 (3d Cir. 1990) (a depositor's loss in

---

[23] This issue is a question of law for the Court. *See In re Sunrise Sec. Litig.*, 916 F.2d 874, 882 (3d Cir. 1990) ("Whether a claim is individual or derivative is determined from the body of the complaint rather than from the label employed by the parties.").

[24] Although a depositor is a creditor of a bank or savings and loan, "courts have relied on the principles applicable in shareholder suits in deciding whether deposits and other creditors have stated a claim that may be bought individually." *In re Sunrise Sec. Litig.*, 916 F.2d at 880 (citations omitted).

an insolvent institution is a derivative claim that can only be brought on behalf of the institution by the receiver); *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 640-41 (9th Cir. 1988) (dismissing shareholder and guarantor RICO claims because they were derivative).[25]

Cases cited by plaintiffs which permitted direct claims to proceed are all distinguishable. For example, in *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1279-80 (7th Cir. 1989), the court permitted suit against officers of a bankrupt corporation because the injury suffered by the RICO plaintiffs was significantly different than the injury suffered by creditors in general.[26] Similarly, in *University of Maryland v. Peat Marwick Main & Co.*, 923 F.2d 265 (3d Cir. 1991), plaintiffs were policyholders of an insolvent insurance company whose RICO claim against the insurer's independent auditors was direct and not derivative based on a breach of duties owed by the defendant directly to

---

[25] The Court rejects plaintiffs' argument that RICO's lack of separate standing requirements permits recovery for indirect injury that would otherwise be characterized as derivative. Such a result would impermissibly expand federal jurisdiction over suits that are barred under other substantive legal principles. *See Warren v. Manufacturers Nat'l Bank*, 759 F.2d 542, 545 (6th Cir. 1985).

[26] Indeed, the Seventh Circuit contrasted *Ashland Oil* with the result reached by the district court in *Dana Molded Prods., Inc. v. Brodner*, 58 Bankr. 576 (N.D. Ill. 1986), which barred a RICO claim as derivative because "the predicate acts of racketeering on which plaintiff bases its claim all involve fraudulent transfers of money [from the bankrupt corporation] and the injuries plaintiff asserts are indistinguishable from those suffered by [the bankrupt corporation] itself." *Id.* at 579. *Dana Molded Products*, rather than *Ashland Oil*, is more akin to the facts facing the Court here.

the plaintiffs, not to the insolvent insurer. *Id.* at 273. Neither of these cases support a proposition other than that already recognized by the Court: "Absent allegations of a special duty to the depositors or injury distinct from that suffered by other depositors, plaintiffs' claims fail to state a claim upon which relief can be granted." *See* Order, ¶ 2 & n.1 (citing *Sparling*, 864 F.2d at 640).[27]

Plaintiffs also contend that the result reached by the Third Circuit in *Sunrise* does not apply to this case and that *Harmsen v. Smith*, 542 F.2d 496 (9th Cir. 1976), *cert. denied*, 464 U.S. 822, 104 S. Ct. 89, 78 L.Ed.2d 97 (1983), is the controlling precedent.[28] However, *Harmsen* held that a

---

[27] The Court invited plaintiffs to plead the one condition that would permit them to avoid this result: a special duty to the depositors that would give them direct claims. The only other condition that would permit a direct suit – special injury not suffered by all deposits – cannot apply in these circumstances where the plaintiffs are, by definition, the putative class of all depositors. *See* Order, ¶ 2 at 2-3 & n.1.

Plaintiffs allege a "special duty" exists because all the defendants were aware of the criminal conduct of BCCI and the risk to depositors' funds, and since public disclosure of this information would have prevented depositors from placing their funds in BCCI, defendants had a duty to disclose their knowledge of BCCI's fraudulent operation. *See* Complaint, ¶¶ 1(a), 17(b) & (c), 37. Plaintiffs' conclusory statements neither change the character of plaintiffs' claims nor establish that a special duty exists. *See Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981), *cert. denied*, 454 U.S. 1031, 102 S. Ct. 567, 70 L.Ed.2d 474 (1981). Because the plaintiffs have failed to adequately plead a special duty, the Court finds that neither a special duty nor a distinct injury exists that might provide an exception to a bar of plaintiffs' derivative claims.

[28] The Third Circuit in *Sunrise* expressly declined to follow *Harmsen*, noting first that the result reached by the Ninth Circuit

depositor who has lost funds in an insolvent institution as a result of fraud by the bank's officers states a claim for direct injury under the National Bank Act, 12 U.S.C. § 93. Not only is *Harmsen*'s holding expressly limited to actions brought under section 93 of the National Bank Act, *Harmsen*, 542 F.2d at 501-02, but the result in *Harmsen* appears inconsistent with the principles it purports to apply. *See supra*, n.28; *compare Leach v. Federal Deposit Ins. Corp.*, 860 F.2d 1266, 1271-74 (5th Cir. 1988), *cert. denied*, 491 U.S. 905, 109 S. Ct. 3186, 105 L.Ed.2d 695 (1989) (describing its result as consistent with *Harmsen*, the court held that absent special duty or distinct injury, minority shareholder's suit under *both* section 93 of the National Bank Act and RICO is derivative and cannot be maintained).

Finally, plaintiffs contend that *Sparling*'s rule barring derivative suits does not apply where fraud *by* a corporation has occurred, as opposed to fraud *on* a corporation, where the corporation may sue to recover for harm done to it. Plaintiffs argue that their claims are direct and appropriate for class-action prosecution under Rule 23 of the Federal Rules of Civil Procedure because (a) unlike those cases finding claims to be derivative, no liquidator exists to prosecute BCCI claims; (b) even if such a trustee existed, claims belonging to the depositors could not be

---

in *Harmsen* ran counter to the general rule, recognized in *Harmsen*, that shareholders may not recover directly for the injuries sustained by the bank but must demonstrate injury to themselves "as distinct from the bank." *In re Sunrise Sec. Litig.*, 916 F.2d at 886. Further, the Third Circuit observed that the result in *Harmsen* "has not been adopted by other courts." *Id.* at 886 & n.12 (citing cases).

prosecuted by such a trustee; and (c) prosecution by the trustee of the depositors' claims would be subject to an *in pari delicto* defense, since BCCI was not a victim but a perpetrator.

a. **Existing Receiver**. Since the assumption of a receiver who will represent the depositors' interest underlies all of the cases holding claims to be derivative, plaintiffs contend that the cases are inapposite because no liquidator exists that will prosecute the claims of BCCI. This assertion is belied by the appointment of the Joint Provisional Liquidators by the High Court in London. Plaintiffs' assertion that the liquidators will not prosecute these claims is belied by the proposed settlement with Abu Dhabi for $ 2.2 billion and recent claims filed against Ernst & Young.

b. **Trustee's Standing**. The cases relied upon by plaintiffs, *i.e.*, *Williams v. California 1st Bank*, 859 F.2d 664, 667 (9th Cir. 1988); *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 92 S. Ct. 1678, 32 L.Ed.2d 195 (1972); *In re Lendvest Mortgage, Inc.*, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 73,595 at 97,812 (N.D. Cal. July 27, 1990), are inapposite and involve circumstances where plaintiffs had individual causes of action that could not be pursued by the corporation's representatives on their behalf.

c. ***In Pari Delicto* Defense**. Plaintiffs, relying upon *Cenco, Inc. v. Seidman & Seidman*, 686 F.2d 449 (7th Cir.), *cert. denied*, 459 U.S. 880, 103 S. Ct. 177, 74 L.Ed.2d 145 (1982), contend that where the corporation is the perpetrator of a fraud and benefits from it, the trustee stands in the corporation's shoes and cannot maintain a claim like the one asserted by plaintiffs here. However, the

Seventh Circuit later limited the result in *Cenco* to situations where the fraud benefits the corporation. *See Schacht v. Brown*, 711 F.2d 1343, 1347-48 (7th Cir.), *cert. denied*, 464 U.S. 1002, 104 S. Ct. 508, 78 L.Ed.2d 698 (1983); *see also Kempe v. Monitor Intermediaries, Inc.*, 785 F.2d 1443, 1444 (9th Cir. 1986) (in a case "indistinguishable from" *Schacht*, the court found that the liquidator had standing to sue under RICO). Here, BCCI did not benefit from the dissipation of its assets; indeed, plaintiffs' repetitively assert that BCCI is "hopelessly insolvent."[29]

D. SUBJECT MATTER JURISDICTION

Before considering the issues raised by the motions of PW/UK and ADIA to dismiss for lack of subject matter jurisdiction, the Court must first evaluate plaintiffs' claims in light of two requirements imposed by RICO: (1) proximate cause, and (2) cognizable injury.

1. RICO's Proximate Cause Requirement

Section 1964 of RICO, which provides civil remedies for violation of RICO, states that "[a]ny person injured in his business or property *by reason of* a violation of section 1962 . . . may sue . . . " 18 U.S.C. § 1964(c) (emphasis

---

[29] Additionally, *in pari delicto* is an equitable defense. When application of the doctrine is not in the public interest, recovery is permitted. *In re Leasing Consultants, Inc.*, 592 F.2d 103, 110 (2d Cir. 1979); *see In re Wedtech Corp.*, 88 Bankr. 619, 622 (Bankr. S.N.D.Y. 1988) ("a trustee's ability to obtain a recovery for an estate and its blameless creditors may not be denied by the prepetition wrongful conduct of the debtor").

added). Thus, the harm alleged must be "by reason of," or proximately caused by, the predicate acts. *See Holmes v. Securities Investors Protection Corp.*, 112 S. Ct. 1311, 117 L.Ed.2d 532 (1992); *Brandenburg v. Seidel*, 859 F.2d 1179, 1188 (4th Cir. 1988) (defendant is responsible for injuries flowing from defendant's predicate act liability).

Plaintiffs state a RICO claim only to the extent that the harm they suffer is proximately caused by the predicate acts of racketeering they allege. *Holmes*, 112 S. Ct. 1311, 117 L.Ed.2d 532; *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 294 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 332, 116 L.Ed.2d 272 (1991); *see also Bastian v. Petren Resources Corp.*, 892 F.2d 680, 686 (7th Cir.), *cert. denied*, 110 S. Ct. 2590, 110 L.Ed.2d 270 (1990) (unless plaintiffs are worse off as a result of defendant's acts than they would have been in the absence of defendant's acts, the causal nexus required is absent); *compare O'Malley v. O'Neill*, 887 F.2d 1557 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 2620, 110 L.Ed.2d 641 (1990); *Burdick v. American Express Co.*, 865 F.2d 527 (2d Cir. 1989); *Sperber v. Boesky*, 849 F.2d 60 (2d Cir. 1988).

Under the circumstances, proximate cause is a question of law for the Court. *Benefiel v. Exxon Corp.*, 92 Daily Journal D.A.R. 3972, 3973 (9th Cir. Mar. 25, 1992) ("[W]here causation cannot reasonably be established under the facts alleged by a plaintiff, the question of proximate cause is one for the court."); *see Brandenburg*, 859 F.2d at 1189 (proximate cause is a question for the court). Consequently, the Court can determine whether plaintiffs' injuries are sufficiently connected to the alleged RICO predicate acts to state a claim, considering factors such as foreseeability of the particular injury, the

intervention of other independent causes, and the factual directness of the causal connection. *Id.* (citing Restatement (Second) of Torts § 548A comments a, b).

Here, plaintiffs allege twenty-eight specific predicate acts of racketeering. *See* Complaint, ¶¶ 350(f)-(ag).[30] Few of these alleged acts, however, have the requisite causal connection to the loss of plaintiffs' deposits. The harm inflicted upon plaintiffs stems solely from the looting of depositors' funds, made possible because of allegedly fraudulent statements made regarding BCCI's financial condition and falsified account information that hid BCCI's true financial condition. *See* Complaint, ¶¶ 350(h); 350(o); 350(ad); 350(af); *see also id.* ¶¶ 291(a)-(x), (aa)-(ao); ¶¶ 296-308. The alleged acquisition of control in United States banks, *id.*, ¶¶ 350(f) & (y), also proximately caused plaintiffs' loss, but only insofar as BCCI dispatched depositors' money to strawmen or frontmen for illegitimate purposes (assuming that the "infiltration of the United States banking system" resulted in a net cost to BCCI, which is not clear in the Complaint.).[31]

---

[30] In the Order, the court required plaintiffs to "[a]ppend[] paragraph 350 of the complaint" and "describe the causal relationship between plaintiffs' alleged injury and *each* defendants' violation of: (i) specific predicate acts; and (ii) RICO section 1962(c) and (d). Order, ¶ 10(M) (emphasis in original).

[31] Several alleged predicate acts involving the United States banks obviously enriched BCCI rather than depleted the deposits' funds and could not have caused deposit losses. *E.g.*, *id.*, ¶¶ 350(aa) (causing defendant First American to funnel $ 220 million to BCCI); 350(l) (causing numerous United States banks that BCCI illegally acquired or controlled to make illegal political contributions in order to gain political favor for BCCI).

On the other hand, the following predicate acts of racketeering, allegedly committed by all of the defendants, did not proximately cause plaintiffs' losses:[32]

> (1) acquiring or controlling numerous United States banks, *id.*, ¶ 350(f) & (y), and then covering up that ownership, *id.*, ¶ 350(r);
>
> (2) financing illegal drug transactions, *id.*, ¶ 350(g);
>
> (3) smuggling coffee into the United States, *id.*, ¶ 350(i);
>
> (4) assisting former heads of state Manuel Noriega and Alan Garcia to loot the national treasuries of Panama and Peru; *id.*, ¶ 350(j), (v) & (ae);
>
> (5) laundering money and improperly pleading guilty to that charge to avoid further prosecution, *id.*, ¶ 350(k) & (ac);
>
> (6) causing the United States banks BCCI illegally acquired or controlled to make illegal political contributions, *id.*, ¶ 350(l);

---

[32] Plaintiffs also allege, as predicate acts of racketeering, that BCCI bribed Peruvian bankers to obtain deposits from Peru's Central Bank, *id.*, ¶ 350(w) & (ab), and bribed a former BCCI employee in London to keep him from blowing the whistle on BCCI's illegal conduct, *id.*, ¶ 350(ab). However, to qualify as RICO predicate acts, conduct must be indictable or punishable under United States laws. Since bribery under 18 U.S.C. § 201 only applies to "public officials," *see* 18 U.S.C. § 201(a)(1), a group to which Peruvian bankers and London BCCI employees do not belong, this conduct is not racketeering activity under RICO. *See Peters v. Welsh Dev. Agency*, 1991 U.S. Dist, LEXIS 12174 (N.D. Ill. Aug. 29, 1991).

(7) assisting arms smuggling to Iran, *id.*, ¶ 350(m);

(8) delaying investigation into BCCI's United States conduct by buying political favor, *id.*, ¶ 350(n);

(9) securities fraud committed by CenTrust, *id.*, ¶ 350(p);

(10) falsifying CenTrust's financial condition and artificially inflating CenTrust's financial condition, delaying its regulatory seizure, *id.*, ¶ 350(q) & (z);

(11) illegally funneling $3 million from a telemarketing scheme out of the United States, *id.*, ¶ 350(s);

(12) financing the sale of French-manufactured aircraft owned by Argentina to third world countries, *id.*, ¶ 350(t);

(13) financing international terrorism, *id.*, ¶ 350(u);

(14) assisting in the sale of Jordanian helicopters to Guatemala, *id.*, ¶ 350(x); and

(15) BCCI's illegal acceptance of deposits in its United States agency offices, *id.*, ¶ 350(ag).[33]

---

[33] The fact that BCCI accepted plaintiffs' deposits, whether that transaction is characterized as legal or illegal, will always be a necessary element of any but-for causation link but it is not the proximate cause of plaintiffs' loss. *See Brandenburg*, 859 F.2d at 1189 ("[A]s a factual matter, plaintiffs would not have lost any interest on their deposits but for having made them in the first place.").

Indeed, plaintiffs themselves recognize that the victims of many of these predicate acts were not the depositors but others, including BCCI, *id.*, ¶ 350(h), the government of Peru, *id.*, ¶ 350(v), the American taxpayers, *id.*, ¶ 350(z), and defendant First American. *Id.*, ¶ 350(aa).

By including allegations of BCCI's criminal activities and United States banking violations in the Complaint, plaintiffs purport to have an interest in far more conduct, engaged in by many more defendants, than those which proximately caused the loss of their deposits.[34] To include defendants' United States activity in their causal chain, plaintiffs allege that their injuries were caused by (a) acts of the defendants here in United States that helped avoid detection by United States banking regulators and permitted BCCI's illegal activities in the United States (including the solicitation of deposits) to continue; (b) the eventual discovery by United States regulators of BCCI's illegal conduct in the United States banking industry; and (c) the role of United States regulators in prompting overseas regulators to close BCCI. *See* Complaint, ¶¶ 342, 350, & 358.[35] However, plaintiffs' "causal" allegations implicating the activities of the defendants in the United States and the role United States regulators played in BCCI's seizure do not comport with plaintiffs' factual

---

[34] For example, though plaintiffs have sought the default of deposed Panamanian dictator Manuel Noriega, Noriega's alleged misconduct, *i.e.*, looting the national treasury of Panama, has no nexus whatsoever to plaintiffs' losses, let along being the proximate cause of their losses.

[35] These causal allegations were specifically ordered by the Court. *See supra* n.13.

description of the events leading up to the seizure. *See* Complaint, ¶ 296 at 240 (inquiries from the Bank of England led to the discovery of massive fraud at BCCI and the subsequent regulatory seizure; United States regulators were not involved).[36]

2. Plaintiffs Lack Injuries That Support RICO Claims

Injury is the *sine qua non* of recovery by plaintiffs on their RICO claims. *Kaiser Cement Corp. v. Fischbach & Moore, Inc.*, 793 F.2d 1100, 1104 (9th Cir. 1986), *cert. denied*, 479 U.S. 949, 107 S. Ct. 435, 93 L.Ed.2d 384 (1986) (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S. Ct. 3275, 3286, 87 L.Ed.2d 346 (1985)). Without injury, plaintiffs cannot maintain their RICO claims. *See John L. Motley Assocs., Inc. v. Rumbaugh*, 104 Bankr. 683 (E.D. Pa. 1989) (no standing to assert RICO claim if claim can be satisfied from bankruptcy estate because plaintiff cannot show requisite "injury"); *Banker's Trust Co. v. Rhoades*, 859 F.2d 1096, 1106 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007, 109 S. Ct. 1642, 104 L.Ed.2d 158 (1989) (where plaintiffs' claims against former officers of insolvent corporation overlapped with claims asserted by its trustee in bankruptcy, plaintiffs' damages were "unrecoverable," "speculative,"

---

[36] Significantly, no United States representative participated in the College of Regulators, the regulatory body that undertook regulation of BCCI's activities. This substantial regulatory interest by European authorities began as early as 1988, independently of United States regulatory activities. *See* Testimony of Gerald Corrigan before the House Banking Comm. (Sept. 18, 1991) (Abu Dhabi Motion, Ex. 3).

and "unprovable"; plaintiffs' injury was wholly dependent upon the trustee's lack of recovery); *Barnett v. Stern*, 909 F.2d 973, 977 n.4 (7th Cir. 1990) (RICO claims are premature where it was uncertain whether plaintiffs would satisfy their claims from the bankruptcy estate); *L'Europeene de Banque v. La Republica de Venezuela*, 700 F. Supp. 114, 118-19 (S.D.N.Y. 1988). All BCCI depositors lack the requisite injury to proceed with RICO claims at this time.[37]

Plaintiffs distinguish *Bankers Trust* and argue that it should not apply because the Second Circuit applied a "discovery of injury" accrual to a RICO cause of action and stated that "refusal to award damages as too speculative is equivalent to holding that no cause of action has yet accrued." *Id.* at 1106 (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 339, 91 S. Ct. 795, 806, 28 L.Ed.2d 77 (1971)). In contrast, plaintiffs contend that a RICO claim accrues in the Ninth Circuit when the plaintiff has "actual or constructive knowledge of the fraud." *Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271, 275 (9th Cir. 1988). However, a more precise statement of the rule is that the limitations period in the

---

[37] Certain putative class plaintiffs' claims may never suffer injury giving rise to a RICO claim. In the United States, BCCI assets held by the Superintendents of Banking of New York and California are being distributed to depositors. Since available assets in both states far exceed political claims and only the excess will be turned over the foreign BCCI liquidators, no BCCI deposits who had money in United States offices on July 5, 1991 will lose their deposits. Similarly, depositors in Pakistan and Oman may not lose any of their deposits because those governments have announced their intention to insure depositor losses.

Ninth Circuit begins to run " 'when the plaintiff knows or has reason to know of the *injury* which is the basis for his action.' " *Beneficial Standard Life*, 851 F.2d at 274 (citing and approving the accrual rule stated in *Compton v. Ide*, 732 F.2d 1429, 1433 (9th Cir. 1984)) (emphasis added); *State Farm Mutual Auto Ins. Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) (same). Accordingly, plaintiffs' distinction does not avoid the Court's application of *Bankers Trust* to their RICO claims.[38]

3. Extra-Territorial Jurisdiction

While Congress certainly has the authority to enact laws that reach conduct occurring outside the territorial boundaries of the United States, whether Congress has in fact exercised that authority is a question of statutory construction. *EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227, 1230, 113 L.Ed.2d 274 (1991); *Republic of Phillipines v. Marcos*, 818 F.2d 1473, 1478 (9th Cir. 1987), *on reh'g*, 862 F.2d 1355 (9th Cir. 1988) (thefts occurring in the Phillipines "quite probably" not reached by RICO and finding jurisdiction solely on the basis of acts occurring in the United States). However, there is a strong presumption against extra-territorial application of any federal statute

---

[38] Additionally, plaintiffs attempt to distinguish *John L. Motley Assocs., Banker's Trust, Barnett*, and *L'Europeene de Banque* on the grounds that, unlike the case before the Court, (1) full recovery was certain in the bankruptcy proceedings; (2) the trustees were appointed pursuant to an orderly scheme, *e.g.*, the U.S. Bankruptcy laws; and (3) rulings that plaintiffs stated no RICO injury did not end those plaintiffs' suits. These contentions are either factually incorrect or unpersuasive.

and unless a contrary intent appears, the statute is meant to apply only within the territorial jurisdiction of the United States. *See EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227, 1230, 113 L.Ed.2d 274 (1991) (Title VII does not apply extra-territorially); *Independent Union of Flight Attendants v. Pan Am. World Airways, Inc.*, 923 F.2d 678, 680-82 (9th Cir. 1991), *op. withdrawn and appeal dismissed on other grounds*, 92 Daily Journal D.A.R. 4909 (9th Cir. Apr. 10, 1992) (National Railway Labor Act does not apply extra-territorially).[39]

To determine whether foreign conduct vests the Court with subject matter jurisdiction requires the Court to undertake three separate inquiries: (1) the effect or intended effect on the foreign commerce of the United States; (2) the type and magnitude of the alleged illegal behavior; and (3) the appropriateness of exercising extra-territorial jurisdiction in light of considerations of international comity and fairness. *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 749 F.2d 1378, 1381 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032, 105 S. Ct. 3514, 87 L.Ed.2d 643 (1985) (citing *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 613 (9th Cir. 1976) (*Timberland I*)).[40]

---

[39] When a court encounters activity that is predominately foreign, it must question whether "Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries. *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir.), *cert. denied*, 423 U.S. 1018, 96 S. Ct. 453, 46 L.Ed.2d 389 (1975).

[40] A motion to dismiss for lack of subject matter jurisdiction is generally treated as a Rule 12(b)(1) "speaking motion" and

Assuming *arguendo* that the first two *Timberlane I* elements are met here, the Court must then determine "whether the interests of, and links to, the United States – including the magnitude of the effect on American foreign commerce – are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority." *Timberlane I*, 549 F.2d at 613. This determination requires the Court to consider seven factors:

> (1) the degree of conflict with foreign law or policy, (2) the nationality or allegiance of the parties and the locations or principal places of businesses or corporations, (3) the extent to which enforcement by either state can be expected to achieve compliance, (4) the relative significance of effects on the United States as compared with those elsewhere, (5) the extent to which there is explicit purpose to harm or affect

---

summary judgment treatment under Rule 56 of the Federal Rules of Civil Procedure is not required. *Trentacosta v. Frontier Pac. Aircraft Indus., Inc.*, 813 F.2d 1553, 1558 (9th Cir. 987); *see McCarthy v. United States*, 850 F.2d 558 (9th Cir. 1987); *cert. denied*, 489 U.S. 1052, 109 S. Ct. 1312, 103 L.Ed.2d 581 (1988) (a court is not restricted to the face of the pleadings when considering a Rule 12(b)(1) motion but may review any evidence that might resolve factual disputes concerning the existence of jurisdiction).

If the Court were to resolve the question of jurisdiction on either of the first two parts of the *Timberlane I* test, however, the issues might be sufficiently intertwined with the merits of the treatment. *Timberlane Lumber Co. v. Bank of Am. N.T. & S.A.*, 749 F.2d 1378, 1381 (9th Cir. 1984). On the other hand, refusal to exercise jurisdiction under the third part of the *Timberlane I* test need not directly implicate the merits of the case and Rule 12(b)(1) dismissal would be proper when the case is dismissed on that basis. *Id.*

> American commerce, (6) the foreseeability of such effect, and (7) the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

Id. at 614; *see Vespa of Am. Corp. v. Bajaj Auto Ltd.*, 550 F. Supp. 224 (N.D. Cal. 1982). Since only racketeering acts that are predominantly foreign caused plaintiffs' losses, and United States depositors will never suffer any injury because no United States depositors will be lost, the exercise of subject matter jurisdiction over this case would be improper.

a. **Degree of conflict with foreign law or policy**. This element of *Timberlane I*'s test is usually applied in antitrust cases, where foreign policies and market systems often run counter to those policies expressed in United States antitrust law. RICO, on the other hand, prohibits acts that are – for the most part – prohibited everywhere.[41] However, the prosecution of plaintiffs' RICO claims here has the potential to interfere with the orderly liquidation of BCCI, presently proceeding in the United Kingdom, Luxembourg, and the Cayman Islands (where BCCI's main operations existed), as well as in many of the sixty nine countries where BCCI accepted deposits. This action certainly conflicts with those foreign proceedings.

---

[41] Plaintiffs' conclusion, however, that *Timberlane* is therefore inapplicable to this case does not follow. Many key provisions of RICO were patterned after the antitrust laws and are construed by analyzing antitrust jurisprudence. Thus, the *Timberlane I* test applies to plaintiffs' RICO claims.

b. **Nationality or allegiance of the parties and the locations or principal places of businesses or corporations.** Few of the one million plaintiffs deposited money in United States offices of BCCI. The defendants whose conduct principally contributed to plaintiffs' losses are all foreign. Additionally, the locations or principal places of the relevant businesses or corporations are all foreign. By including the infiltration of the United States banking system by BCCI in their RICO claim, plaintiffs confuse the true nature of their looting claim and the appearance that an abundance of relevant activity and parties exist in the United States is misleading. Plaintiffs' argument that the American banks are like subsidiaries of BCCI that weigh in favor of exercising jurisdiction here is wrong.

c. **Degree to which enforcement by either state can be expected to achieve compliance.** It would be very difficult, if not impossible, for plaintiffs to enforce any judgment that might be entered by the Court here in many of the sixty-eight other countries where BCCI accepted deposits.[42] Furthermore, the possibility that the Court's decisions may not have preclusive effect outside United States boundaries, particularly after what promises to be lengthy and expensive litigation, makes the exercise of extraterritorial jurisdiction here improper.

---

[42] The Court has considered expert opinions on the enforceability of a RICO judgment in the six countries where BCCI chiefly operated – the United Kingdom, Hong Kong, Luxembourg, the Grand Cayman Islands, Bahrain, and the United Arab Emirates – as well as thirty-eight additional countries.

d. **Relative significance of effects on the United States as compared with those elsewhere.** Plaintiffs contend that the criminal conduct charged against BCCI in the United States and the guilty pleas entered by BCCI here not only show the influence BCCI had in the United States, but that the guilty pleas would be admissible in plaintiffs' RICO suit and would have preclusive effect. Plaintiffs' argument is faulty because the conduct alleged in criminal cases in the United States did not cause plaintiffs' loss, and the guilty pleas were by BCCI, who is not a defendant here.

BCCI is a foreign bank with its core operations in Europe, the Middle East, and Africa. At the time it closed in July 1991, BCCI only had two agencies open in the United States. On June 30, 1991, with world-wide deposits reported at $ 15.969 billion, only 1/2 of one percent of those deposits were in BCCI's United States agencies. Not only are 99 1/2 percent of BCCI deposits foreign, none of the deposits made in United States agency offices will be lost.[43]

e. **Extent to which there is explicit purpose to harm or affect American commerce and the foreseeability of such effect.** Plaintiffs contend that BCCI solicited and accepted depositors' money here in the

---

[43] Even assuming that United States deposits will be returned to the depositors without any interest for the time the funds were unavailable, that interest constitutes a small percentage of the 1/2 of one percent of the total BCCI deposits made in the United States. More importantly, that lost interest is only a minuscule portion of the deposits lost outside the United States.

United States through its agency offices, despite the fact that it was illegal for BCCI to do so. *See* Complaint, ¶¶ 33, 289(f). However, no justiciable [sic] injury may ever arise from those deposits allegedly made in the United States. Though plaintiffs contend that BCCI's involvement in the United States banking system affects United States commerce, this conduct did not injure plaintiffs. Similarly, the fraud allegedly perpetrated by the accounting firms and H&K in the United States, *see* Complaint, ¶¶ 28, 36, does not reflect an intended effect on United State [sic] commerce because all of plaintiffs' losses stem from their deposit in BCCI's foreign operations.

f. **Relative importance to the violations charged of conduct within the United States as compared with conduct abroad.** Since none of the predicate acts that caused plaintiffs' injuries occurred here, the United States has very little interest in the foreign conduct of BCCI, however egregious it may be. Construing RICO to provide a remedy to this foreign fraud would give RICO a "nearly boundless extraterritorial scope," providing "a vehicle for adventurous civil and criminal litigators with an itch to see the world." *Peters v. Welsh Dev. Agency*, 1991 U.S. Dist. LEXIS 12174 (N.D. Ill. Aug. 29, 1991).

E. FORUM NON CONVENIENS

A party moving to dismiss on grounds of forum non conveniens must show two things: (1) the existence of an adequate alternative forum, and (2) that the balance of private and public interest factors favors dismissal. *Lockman Foundation v. Evangelical Alliance Mission*, 930 F.2d 764, 767 (9th Cir. 1991). The requirement of an adequate

alternative forum is ordinarily satisfied when a defendant is "amenable to process" in the other jurisdiction. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22, 102 S. Ct. 252, 265 n.22, 70 L.Ed.2d 419, 435 n.22 (1981) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506-07, 67 S. Ct. 839, 842, 91 L.Ed. 1055, 1061 (1947)).

Here, not all defendants are amenable to process in the United Kingdom. One of BCCI's principal accounting firms (PW/UK), BCCI's public relations firm (H&K), and defendants Naqvi and Iqbal are all subject to U.K. jurisdiction. Defendants BofA, PW/US, and E&Y have stipulated to accede to U.K. jurisdiction. On the other hand, the Clifford Defendants, the InterRedec Defendants, the First American Defendants, and defendant Dobrich contest United Kingdom jurisdiction and are probably not subject to compelled process in the U.K.

The defendants invite the Court to distinguish between "key" defendants – subject to process in the U.K. – and those United States defendants whose conduct did not proximately cause plaintiffs' losses. However, plaintiffs' allegations of conspiracy and aiding and abetting foreclose such a distinction at this time. Thus, assuming *arguendo* that the parties are otherwise properly before the Court, defendants' motion to dismiss on forum non conveniens grounds is denied.

F. MISCELLANEOUS MATTERS

Plaintiffs initially filed their complaint in this action on August 21, 1991; plaintiffs' filed a first amended complaint on September 11, 1991. Leave of Court would therefore be required for plaintiffs to add parties at this

stage of the litigation. *See* Fed. R. Civ. P. 15(a); 21. Having dismissed the Complaint without leave to amend, plaintiffs' motion to add parties is moot.[44]

On a Rule 12(b)(6) motion, it would be premature for the Court to preclusively conclude that no global or worldwide entity theory is available to plaintiffs. *See Department of Econ. Dev. v. Arthur Andersen & Co.*, 683 F. Supp. 1463, 1468 n.1 (S.D.N.Y. 1988) (whether affiliated accounting firms are a single global partnership is a question of fact). The Court's ruling on this issue in the Order was based on the facts as alleged at that time and does not constitute the law of the case. Accordingly, PW/World Firm's motion to strike all references in the Complaint to a "worldwide partnership" with the name "Price Waterhouse," based on the law of the case doctrine, is denied.

As a result of the Court's resolution of the subject matter jurisdiction question, it is unnecessary for the Court to reach the issues of sovereign immunity or personal jurisdiction raised by ADIA's motion to dismiss.

III. CONCLUSION

Though plaintiffs' allegations meet the specificity requirements of federal pleading, plaintiffs' RICO claims

---

[44] Consequently, the motion to dismiss brought by Paul C. Warnke, John F. Kovin, David I. Granger, Harold D. Murry, Jr., John G. Calendar, J. Griffin Lesher, Bryan Jay Yolles, Robert P. Reznick, Philip H. Hecht, and James C. Duff is not before this Court.

must be dismissed without leave to amend because plaintiffs clearly allege that no ascertainable structure exists in their RICO enterprises apart from the alleged pattern of racketeering. Additionally, plaintiffs' section 1962(a) RICO claim must be dismissed without leave to amend because no injury from the use or investment of racketeering income exists where only reinvestment is alleged.

Furthermore, plaintiffs are unable to proceed with their claims because they lack standing. Not only are plaintiffs' claims derivative of BCCI and plaintiffs cannot allege any special duty or distinct injury that might avoid this bar to their suit, but plaintiffs fail to allege an injury presently giving rise to their RICO claims because all or part of their claims may be satisfied through liquidation proceedings.

Finally, in light of the foreign conduct that proximately caused plaintiffs' losses and the negligible injuries that might possibly occur to plaintiffs as a result of BCCI's activities in the United States, the Court lacks subject matter jurisdiction under principles of international comity and fairness.

Based on the foregoing, IT IS HEREBY ORDERED that plaintiffs' Complaint is dismissed without leave to amend. The Clerk is ordered to serve a copy of this memorandum opinion on the parties forthwith.

IT IS SO ORDERED.

DATED: 5/20, 1992

/s/
CONSUELO B. MARSHALL
UNITED STATES
DISTRICT JUDGE